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Provisional agenda for the fifty-sixth session

To be convened at the United Nations Office at Geneva on Monday, 3 May 2004, at 3 p.m.

1. Organization of work of the session.
2. Responsibility of international organizations.
3. Diplomatic protection.
4. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities).
5. Unilateral acts of States.
6. Reservations to treaties.
7. Shared natural resources.
8. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Programme, procedures and working methods of the Commission and its documentation.
10. Cooperation with other bodies.
11. Date and place of the fifty-seventh session.
12. Other business.

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International Law Commission
Fifty-sixth session
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Report of the International Law Commission on the work of its fifty-fifth session (2003)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-eighth session, prepared by the Secretariat

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Introduction

1. At its fifty-eighth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 29 September 2003, to include in its agenda the item entitled "Report of the International Law Commission on the work of its fifty-fifth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 14th to 19th meetings, from 27 to 31 October 2003, and at its 20th, 21st and 23rd meetings, on 3, 4 and 6 November 2003. The Chairman of the International Law Commission at its fifty-fifth session introduced the report of the Commission: chapters I to IV and chapter XI at the 14th meeting, on 27 October; chapters V and VI at the 16th meeting, on 29 October; chapters VII and VIII at the 18th meeting, on 30 October; and chapters IX and X at the 20th meeting, on 3 November 2003. At the 23rd meeting, on 6 November 2003, the Sixth Committee adopted draft resolution A/C.6/58/L.25, entitled "Report of the International Law Commission on the work of its fifty-fifth session". The draft resolution was adopted by the General Assembly at its 72nd plenary meeting, on 9 November 2003, as resolution 58/77.

3. By paragraph 19 of resolution 58/77, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the fifty-eighth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of 8 sections: A. Responsibility of international organizations; B. Diplomatic protection; C. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities); D. Unilateral acts of States; E. Reservations to Treaties; F. Shared natural resources; G. Fragmentation of international law: difficulties arising from diversification and expansion of international law; and H. Other decisions and conclusions of the Commission.

Topical summary

A. Responsibility of international organizations

1. General comments

5. A number of delegations welcomed the initiation of work on the topic and, in particular, the provisional adoption of the first three draft articles following the submission of the Special Rapporteur's first report. The remark was made that those draft articles clearly delimited the responsibility of international organizations and established the general principles governing it. It was also observed that those articles, the commentary thereto, the related conceptual clarifications and the envisaged linkages with relevant articles on the responsibility of States for internationally wrongful acts were bound to facilitate future deliberations and exchanges of ideas. However, it was also stated that, in view of the diversified

characteristics of international organizations, the three proposed draft articles on the scope of the work and general principles required further careful consideration.

6. The view was expressed that the topic of the responsibility of international organizations was largely a reflection of the development of international law and the work undertaken by the Commission was an absolute necessity for that development. Cooperation between States had become an important, sometimes essential, factor in international relations and the role of international organizations had taken on increasing importance. Naturally, their legal capacity and real capacity for action had increased, as had the likelihood that their conduct (both actions and omissions) could generate international responsibility. It was noted that although such organizations were playing an increasingly important role, many aspects of their activities remained controversial.

(a) General approach

7. Support was expressed for the general approach taken by the Commission in its work on the topic. A number of suggestions were also made in that respect, including: that the main task should be the codification of the responsibility of intergovernmental international organizations; that the work should not be confined to developing rules for international organizations analogous to those applicable to States; that the work should focus on existing organizations since it would be meaningless to proceed with the study without a clear understanding of the organizations that were currently operating; that, given the absence of an exhaustive list of all of the diverse international organizations, a categorization of existing organizations would serve as a sound basis for the future work; and that the work should take into account the diversity of international organizations.

(b) Complexity of the topic

8. Several delegations emphasized the complexity of the topic which the ILC had recognized in the 1960s when deciding to separate the topic from the topic of State responsibility, despite certain similarities between the rules applicable to them. For example, the functional, structural and conceptual diversity of such organizations made it difficult to define an "international organization" for the purposes of the topic. The need for extensive study of the limited case law on the subject, as well as practice, was underscored.

(c) Diversity of international organizations

9. It was considered essential that the ILC should draft articles that fully reflected the institutional and legal diversity of the structures existing in the international community, which to some extent were sui generis, particularly the "regional economic integration organizations" that were deeply rooted in modern treaty practice. Attention was drawn to the European Community, which went beyond the normal parameters of classic international organizations and was not the "classic" type of international organization for two reasons. Firstly, it was an actor in its own right on the international stage. It entered into international agreements with third countries within its areas of competence and concluded such agreements together with its member States, with the peculiarity that both the Community and the member States assumed international responsibility in relation to their own areas of competence. It also intervened in international disputes, particularly within the

framework of the World Trade Organization. Secondly, the European Community was governed by its own legal order. The rules adopted by virtue of the Treaty of the European Community were part of the national law of member States and were applied by their authorities and courts.

(d) Relationship to the draft articles on State responsibility

10. There was general agreement that the Commission should use the draft articles on the responsibility of States for internationally wrongful acts adopted in 2001 as a starting point or a guide for its work on the present topic for the following reasons: the draft articles embodied rules of customary law accepted by all States; the Commission had developed important principles on international responsibility and the same approach should be followed to the extent that the two issues were parallel, even if the conclusions were not necessarily identical; and the Commission had specified the essential features of the concept of responsibility in international law, and there was in principle no reason for it to change its stand.

11. At the same time, it was considered essential for the Commission to bear in mind the special characteristics of international organizations, which differed in many respects from States, as well as the diversity among international organizations. Whereas in the international legal order the State was a primary subject with substantially consistent characteristics, international organizations, on the other hand, were secondary subjects established by States and were intrinsically diverse in their methods of establishment, personality, powers and methods of operation. It was therefore necessary to study the practice of international organizations in that regard and analyse carefully those areas of their activities in which questions of international responsibility might arise. Solutions devised with regard to State responsibility based on a single concept of a State should not be systematically applied in the case of international organizations, which had their own institutional characteristics and very varied geographical scope and activities. In addition, some issues not addressed in the articles on the responsibility of States for internationally wrongful acts — for example, the responsibility of a State member of an international organization for a wrongful act committed by that organization — would need to be included. Attention was drawn to the Commission's apparent wish to avoid the mistake made when the law of treaties had been codified, of drafting a text that very closely followed the one adopted on the subject of States without taking sufficiently into account specific elements peculiar to international organizations.

12. The view was also expressed that more thought should be given to the present topic. Whereas State responsibility referred to the State, a clear and uniform concept in international law, the present topic concerned a category of international persons, international organizations, which were infinitely varied in their functions and powers, in their status, rights and obligations, and in their relationships with members and others. Moreover, in contrast to the many studies on the State responsibility topic, the present topic was an area where practice, case law and specialized studies were relatively sparse. Therefore the Commission should first gather and study such materials as existed across the whole field to be found in the legal branches of the secretariats of the United Nations, the specialized agencies, the international financial institutions and other global and regional institutions, including, for example, the European Community, as well as material available from States and academic circles which would make it possible to identify the areas ripe

for codification or for further study; and then review all sections of the State responsibility articles to determine the magnitude of the issues arising in the current context, rather than simply reproducing the corresponding articles with the usual word changes.

13. It was suggested that a provision could be drafted defining the relationship between the new set of draft articles and those on the international responsibility of States.

(e) Other relevant materials

14. The view was expressed that, in addition to the draft articles on State responsibility, the Commission should take into account current practice and certain academic works, such as those of the International Law Association and a study by the Instituto Hispano-Luso-Americano de Derecho Internacional on international organizations and responsibility relationships. In that study, organizations were treated as both active subjects and passive subjects. International organizations, at least those which were authentic subjects of international law, possessed in principle the general capacity to participate both actively and passively in legal relationships involving international responsibility, but within the limits of their legal personality and the content and scope of their powers. The Commission's report referred to the responsibility of international organizations, i.e., the international organization as a possible responsible subject, but it was unclear which entity would be the passive or injured subject. In principle, it could be any subject of international law, either a State or another international organization. The Commission should give further consideration to the inverse relationship, i.e. where the international organization might be the injured subject and the responsible subject might be a State. It would be advisable to undertake a comprehensive study of the law of the responsibility relationships of international organizations, both inter-organizational and between organizations and States.

2. Article 1. Scope of the present draft articles

(a) General remarks

15. Some delegations indicated that the article was generally acceptable. Support was expressed for excluding organizations established under municipal law as well as non-governmental organizations, which did not perform any governmental functions. However, a concern was expressed regarding contradictions between paragraphs 1 and 2 of article 1.

(b) Internationally wrongful acts

16. There was broad support for limiting the scope of the present draft articles to the responsibility of international organizations for internationally wrongful acts and excluding consideration of the question of liability for injurious consequences arising out of acts not prohibited by international law involving issues of civil liability, as in the case of the draft articles on State responsibility. A question was raised as to whether the Commission was envisaging the possibility of carrying out a study on the liability of international organizations for acts not prohibited under international law. It was furthermore remarked that the draft articles also did not cover the responsibility of the organization under internal law and did not require

the existence of any damage. It was suggested that draft article 1 should reflect article 2 on State responsibility and stipulate that there would be an internationally wrongful act of an international organization when an action or omission was attributable to it and the conduct constituted an international breach.

(c) Paragraph 1

17. Paragraph 1 was described as quite satisfactory. However, there was also a suggestion that a cause-and-effect relationship between the wrongful act and the harm caused should be established.

(d) Paragraph 2

18. Support was expressed for providing that the draft would apply not only to the responsibility of an international organization, but also to the responsibility of a State for the internationally wrongful act of an international organization, which would address one of the issues most urgently requiring regulation by a set of articles and help to fill gaps in the draft articles on State responsibility.

19. Some delegations felt that the paragraph required further consideration. Noting that no mention was made of wrongful acts of the organization itself, it was emphasized that the attribution to States of responsibility for wrongful acts of the organization should be an exception, since the organization should be responsible for its own acts. It was proposed that the draft articles should state that their text would apply to States "when appropriate" and indicate specifically in which cases such responsibility would be attributed. Other suggestions for clarifying the paragraph by indicating the requirements for such State responsibility included the following: that the State was a member State, which should be indicated by using the term "a member State" instead of "a State"; that the State had acted as a member or organ of the international organization; that the acts performed by the organization or its organs had been properly authorized; and that the State had acted in bad faith and in its own interest.

20. Attention was drawn to the complex issues that would need to be addressed: firstly, the cases in which conduct could be attributed to the international organization and not to the States and the hypothesis of joint or concurrent attribution; and secondly, whether the responsibility of the organization and of the State was joint, *in solidum* or secondary. It was noted that those issues were primarily, but not exclusively, the concern of the States members of the organization and, possibly for that reason, the ILC had set aside all issues relating to the responsibility of a State for the conduct of an international organization in article 57 of the draft articles on State responsibility. Doubts were expressed concerning the consideration of this aspect of State responsibility in the current context given the differences between the two issues.

3. Article 2. Use of terms

(a) General remarks

21. The view was expressed that, for the first time, efforts were being made to formulate a substantive legal definition of the concept of an international organization and that such a concept had to form a keystone of the draft articles on the responsibility of international organizations. Some delegations indicated that the

proposed definition of an international organization contained the essential elements, was based on the traditional elements used for such entities and was generally acceptable.

22. A number of delegations believed that the general, broad definitions of international organizations contained in earlier treaties were not sufficient and that it was necessary to provide a more precise definition for the current topic which would take into consideration not only the legal nature of the constituent document but also the functions of the organizations to be covered by the rules on responsibility. The view was expressed that the function of an international organization, rather than the existence of a constituent instrument, should form the basis for its identification and that it was more important that the organization should be performing functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that the obligations and the wrongfulness of any impugned conduct could be attributed to the organization.

23. The view was also expressed that the Commission had struck the right balance between the erroneous equation of international organization and intergovernmental organization and the desire to opt for a homogeneous definition of organization, even at the risk of excessively limiting the scope of the draft articles, while noting also that the provision should perhaps appear at the beginning of the text and not in article 2. However, doubts were expressed concerning the need to depart in the draft articles from the official definition of an international organization as an intergovernmental organization contained in various international conventions. The view was expressed that the international organizations covered by the articles should be of an intergovernmental character. The utility of departing from the simple definition of "international organization" contained in previous codification exercises was also questioned.

24. Noting that the proposed definition would be used in the future for different purposes, it was felt that close attention should be paid both to the text of the definition and to the ILC commentary. The following concerns were expressed regarding the definition: that the draft referred to the "use of terms" rather than expressly defining what was meant by international organizations; that the first part could serve as a starting point, but the last sentence was particularly infelicitous; and that the definition of "international organizations" as "intergovernmental organizations" did not clearly indicate the organizations which would be inside or outside of the scope of the draft articles.

25. The following suggestions were made: the circular definition of an "international organization" as an "organization" should be replaced by "... the term 'international organization' refers to a form of international cooperation ...", the wording from paragraph (4) of the ILC commentary; and the definition of an international organization should indicate the intergovernmental character of international organizations as the core element of the definition by including the term "intergovernmental" or "inter-State".

26. Support was expressed for omitting the words "exercises in its own capacity certain governmental functions", proposed by the Special Rapporteur. The concept of "governmental functions" was considered imprecise and inappropriate since it would require extensive careful analysis to determine the diverse objectives and specific activities of international organizations.

27. The Special Rapporteur noted that article 2 departed from the traditional definition of an international organization in which it was equated to an intergovernmental organization. The aim was to provide a functional definition for the purposes of the draft articles on the responsibility of international organizations, in view of the imprecise and probably inaccurate nature of the traditional definition, and not to provide a general definition that could be applied to other situations, since that would require a more detailed study.

(b) Method of establishment

28. A number of delegations expressed support for the first element of the definition of an international organization. The view was expressed that that definition, which was based neither on the existence of a treaty-based constituent instrument nor on the intergovernmental character of the organization, reflected current reality in that international organizations were also established by instruments which were legally or politically binding. Although practice showed that for the most part such organizations were established by treaty or other formal agreement, it was considered too restrictive to refer to a treaty as the only possible form of agreement.

29. The view was also expressed that, although the proposed definition reflected reality because it was not limited to organizations established by treaty and included organizations created by other instruments governed by international law, it was too broad and raised the question of whether any instrument governed by international law could be used to establish an international organization and whether there were other requirements to be met. More specifically, paragraph (4) of the commentary referred to resolutions adopted by the United Nations General Assembly but did not indicate which international organizations (as opposed to organs of the General Assembly) had been established in that way. International organizations could not be created by resolutions of the General Assembly, although the definition did not preclude the creation of international organizations through decisions of other international organizations. However, in the exceptional cases in which organizations could be created in that way, the relevant decisions must be binding and the creation of a new organization must be in accordance with the powers of the creating organization.

30. The question was raised as to whether entities created by international treaties but rather embryonic in nature would fall within the scope of the draft articles, and who would assume responsibility if one of those entities concluded headquarters agreements and failed to comply with them.

31. It was suggested that the Commission should give further consideration to the question of whether international organizations could be established by other instruments governed by international law, bearing in mind the need to distinguish real international organizations from mere bodies of such organizations. It was also suggested that the term "instrument" required further reflection, since it seemed too broad and vague as a criterion for determining the existence of an international organization. It was further suggested that the existence of an international treaty was necessary only for the purpose of determining the existence of the legal personality of an international organization and that this matter could be addressed in the commentary or included in a separate article.

(c) Legal personality

(i) General remarks

32. A number of delegations expressed support for the second element of the definition. The view was expressed that the legal personality of the international organization, as distinct from that of its member States, reflected in the wording "possessing its own international legal personality" was a logical, important, essential requirement. This element of the definition meant that the organization must be endowed with its own international legal personality, along with the legal capacity to act under the internal law of the States parties, and it must be a subject of international law capable of bringing an international claim or of being held to have international responsibility. International organizations had the capacity to exercise rights and incur obligations as subjects of international law; a broad criterion for the acquisition of legal personality was therefore far more adequate for the purposes of the draft articles than a strict definition of legal personality based only on a specific provision of a constituent instrument. This element avoided the question of the responsibility of non-governmental organizations, since the latter were not yet considered subjects of international law. It was suggested that the requirement of "possessing its own international legal personality", rather than a precondition for being considered international, seemed to be a legal consequence of being an organization. It was also suggested that the international personality of an international organization was determined both by its constitution and by its practice, and that should be reflected in the relevant draft article.

33. Other delegations, however, questioned the inclusion of this element of the definition. The view was expressed that this criterion was superfluous and could unnecessarily complicate the definition of the rules governing the responsibility of international organizations. In principle, it was the treaty establishing an international organization that endowed it with international legal personality and empowered it to perform acts distinct from those of its component entities. Furthermore, it would be difficult to establish formal rules regulating the recognition of the international legal personality of a specific organization.

(ii) Objective personality

34. Attention was drawn to paragraph (9) of the commentary in which ILC had referred to the 1949 advisory opinion of the International Court of Justice in the *Reparation for Injuries* case. The Commission observed that the Court appeared to favour the view that, when legal personality of an organization existed, it was an "objective" personality; in other words, recognition of such personality by an injured State was not necessary. It was suggested that the problem with that reasoning was that it could be accepted only when a dispute arising from an injurious act by a certain organization against a certain State was settled through a third party, which could apply the draft article upon confirmation of the international personality of the organization concerned without involving the injured State's recognition of the international legal personality of that organization. However, when the injured State requested the organization to assume responsibility directly through bilateral channels, and if it intended to invoke the draft article, it would be necessary to determine whether the organization was an international organization and whether it possessed international legal personality. The question would then arise of recognition, or of subjective personality, and in that context it would be

difficult to apply the argument of objective personality. After all, States had the fundamental right to determine whether an organization possessed international legal personality, on the basis of an analysis of all the objective facts relating to that organization.

(iii) Independence

35. The view was expressed that the rules on international responsibility had to be applicable to international organizations that were independent subjects of international law. An international organization existing only on paper or an organization that had not acquired sufficient independence from its members in order to act as an organ common to those members would not objectively possess the personality necessary to incur responsibility; that question had been addressed in draft article 2, by the addition of the word "own" before the words "international legal personality". At the same time, a question was raised as to what an organization "merely existing on paper" was and how it could cause injury to States.

36. The view was also expressed that the essential element was the organization's independent will vis-à-vis the will of States. United Nations decisions attributing responsibility to international organizations took account of the fact that the general rules of the organization were normally laid down in treaties that had been codified and formed part of international law. The Commission should decide whether the International Court of Justice was competent to deal with matters relating to the United Nations and its specialized agencies and other bodies in the United Nations system. The question of the Court's competence in matters relating to the United Nations was important, and such issues could not just be set aside or be entrusted to national courts. For example, if the Security Council did not take a decision because a State had used its veto, such an omission could be regarded as a violation of international law, and the matter should be taken to the Court. That could have certain implications if the injured State claimed that a State had used its veto in its own interest, and if it proved that that was so.

(iv) Unresolved issues relating to the legal personality of particular organizations

37. Attention was drawn to the need to consider unresolved issues relating to the legal personality of particular organizations, such as the Organization for Security and Cooperation in Europe (OSCE) as well as the European Union as distinct from that of the European Community. The Special Rapporteur noted the issues relating to the question of the permanent secretariats of conferences as well as the situation of the European Union as a separate entity from the European Community. The fact that the Community had been recognized as an international organization again raised the problem of the definition, which the members of the two entities would have to solve.

(d) Membership

(i) General remarks

38. A number of delegations expressed support for the third element of the definition. The inclusion of States in the membership of an organization was considered an important, essential criterion which provided greater clarity than the term "intergovernmental organizations". While "traditional" international

organizations were composed only of States, the intergovernmental element had already ceased to be a requirement and an instrument designed to codify existing practice could not ignore that reality. There was no reason to exclude "non-traditional" international organizations from the scope of an instrument intended to establish responsibility for internationally wrongful acts committed by one of the primary non-State subjects of international law. The draft article struck a good balance between traditional definitions of intergovernmental organizations and a broader approach that included non-governmental actors as a reflection of current reality. However, it was also suggested that the element of State membership was necessary only for the purpose of determining the existence of the legal personality of an international organization and could be transferred to the commentary or be included in a separate article.

39. Some delegations felt that the reference to "other entities" was obscure, vague, imprecise and confusing; the term should be clarified and defined in an unambiguous manner. It was suggested that the second sentence should appear in a separate paragraph of the draft article, which could be worded in the following terms: "An international organization is composed of States and may, as the case may be, include among its members entities other than States." The view was expressed that there was merit in the proposed alternative version, which could serve as a basis for the formulation of acceptable wording. The international organization in question was an international organization established by States and consisting basically of States; that was the only way in which the issue of residual international responsibility could be approached. The Special Rapporteur stated that while the proposed definition seemed useful, the goal was not to give a general definition but to explain what was meant by international organization for the purposes of the draft articles.

40. Some delegations believed that the work should focus on intergovernmental organizations and that the ambiguous, overly simplistic reference to "entities" should be deleted. The view was expressed that, according to current practice, an entity could only be a member of an international organization when the constituent instrument of that organization stated very clearly that it could become a member. The statement that there was a "significant trend in practice" towards entities becoming additional members of international organizations seemed too broad and should be further substantiated and evaluated. The view was also expressed that the provision did not clearly set out the absolute supremacy of States in that type of organization and failed to guarantee the "intergovernmental" or "inter-State" character of the organization or its possession of international legal capacity. The term "other entities" was ambiguous since it could mean intergovernmental international organizations or non-governmental organizations, corporations, partnerships or even individuals. That not only unnecessarily expanded the scope of the study but also made it more difficult to determine the character of an organization.

(ii) Responsibility of other entities

41. There were different views concerning the need to consider whether in certain circumstances other entities could incur international responsibility for an act of an international organization. Attention was drawn to the difference between the status of States members of an international organization, which participated as full members, and other entities which normally participated as associated or affiliated

members and might or might not have legal personality and the ability to undertake international obligations. It was also noted that States were the ones that established and financed international organizations. The view was expressed that there was a need to define more precisely what was meant by "members" of an international organization, since under certain circumstances members of an organization could be held responsible for wrongful acts committed by "their" organization, and whether, in addition to full members of international organizations, other participants in their activities (such as associate or affiliate members) could also be held responsible. It was suggested that responsibility for acts of the organization should be limited to full members, in other words, those that could participate with full rights (such as voting rights) in all activities of the organization and determine its acts and policies. It was also suggested that the draft should refer to the responsibility of the State and of the organization and not to that of other entities.

(iii) Responsibility of States not members of the international organization

42. A reservation was expressed concerning paragraph (14) of the commentary to article 2, according to which the question of the international responsibility of States as members of an international organization arose only with regard to States that were members of the organization. If a State committed internationally wrongful acts together with other States members of an international organization, its individual material responsibility vis-à-vis a third State which was not a member of the organization should not be entirely excluded. Failure to include in the draft article rules on the responsibility of such States would leave a serious gap in the institution of international legal responsibility and in the regulation of relations between States and international organizations. The question of the material responsibility of States for specific acts performed by international organizations could be resolved within the framework of the draft articles on the basis of the principles of solidarity and residual responsibility.

4. Article 3. General principles

43. A number of delegations indicated their general approval of the provision. It was noted that article 3 transposed to the responsibility of international organizations the general principles stated in articles 1 and 2 on the responsibility of States for internationally wrongful acts, an analogy that was considered absolutely relevant in that case. However, there was a note of caution that the straightforward and uncontentious character of article 3 should not lead to the conclusion that the articles on State responsibility could easily be adapted to a very different field such as the responsibility of international organizations. It was also suggested that the provision would probably require more attentive re-examination in the light of subsequent articles.

5. Question (a): Reference to the "rules of the organization" in a general rule on attribution of conduct to international organizations

(a) General remarks

44. A number of delegations noted the complexity of the issues relating to attribution. The view was expressed that the question of the attribution of conduct was perhaps legally the most difficult issue. Not only the scope of acts to be attributed to international organizations, but also the legal relationship between

those organizations and their member States would have to be established. In addition, no State or group of States should be permitted to hide behind an international organization in order to evade international responsibility. It was suggested that the Commission should focus initially on determining the manner in which that issue had been addressed by States, international organizations and judicial and arbitral tribunals. Attention was also drawn to certain parallel issues relating to attribution of conduct to States dealt with in articles 4 to 11 of the State responsibility draft.

(b) General rule on attribution

45. The view was expressed that the Commission should formulate a general attribution rule mirroring the one in article 4 of the State responsibility draft. It was suggested that the general rule should be formulated without prejudice to the subsequent formulation of specific rules on various relevant aspects of the subject.

(i) Attribution of acts of organs of an organization

46. The view was expressed that the rule should indicate what in principle should be considered as organs of the organization, on the understanding that the issue was the status of the organ for the purposes of attribution of the wrongful act and not in the sense of the internal law of the organization. The question arose as to how such an organ would be defined and whether the definition would include any person or entity having the status of organ in accordance with the "rules of the organization". A question also arose as to who should decide whether an entity was an organ for the purposes of the articles should a difference of opinion arise in that connection. If the Commission followed the framework of the State responsibility draft articles and referred to the organs of an organization and the rules by which they were established, it would also have to address issues relating to the attribution of responsibility for action not contemplated in those rules.

(ii) Ultra vires *acts*

47. Attention was drawn to the need to address issues relating to acts performed in excess of authority.

(iii) Attribution of acts of an international organization to its member States

48. Attention was drawn to the need to clarify the conditions for attributing acts of an international organization to its member States, especially in areas in which States had transferred competencies to the organization. The question was of particular relevance to States members of the European Union. It was noted that the draft articles on State responsibility regulated in detail the question of attribution without specifically addressing the question of attribution to a State of an act of an international organization. The rules on the responsibility of international organizations should also address the question of attribution of responsibility to an organization for member States' acts. Although State responsibility rules could provide some inspiration, new ground must be broken when defining to what extent a State or State organ could act as an organ of an international organization.

(c) Rules of the organization

49. There was broad agreement that a general rule on attribution should contain a reference to the "rules of the organization" as the basic assumption underlying the attribution of conduct to the organization, possibly in a separate paragraph. From the legal standpoint, the rules of the organization were considered to be very important, not only for regulating the inter-institutional issues arising in connection with the activities of international organizations, but also for defining the relationship between their organs and member States and for regulating relations between the organs and officials of the organization. Given the sphere of application of the rules of the organization, those rules could be very useful when tackling the question of attribution to the organization of internationally wrongful acts committed by one of its organs or officials, and when delimiting the responsibility of international organizations and States.

50. Attention was drawn to the analogy between the reference to internal law in the State responsibility draft article 4 concerning the acts of "State organs" and reference to the "rules of the organization" in the case of organs or other equivalent entities of an international organization. It was considered appropriate to establish a parallel between the internal law of States and the "internal law" of international organizations. The former consisted of the legislation and regulations constituting the legal order of States and, similarly, the internal law of international organizations consisted of the texts establishing the rules governing their organization and functioning. However, it was remarked that merely drawing an analogy between a State and an international organization, particularly the status of the internal law of a State and the rules of an organization, would be an overly simplistic approach. Attention was drawn to the obvious differences between the internal law of the State and the rules of an organization, since the organization might not, for example, have any body empowered to change or interpret the rules.

51. The view was expressed that the rules of the organization could not be clearly differentiated from international law and could offer important information on the obligations of international organizations, as well as on the competencies of the various organs of an organization. Most of the rules of international organizations normally took the form of a treaty and constituted international law: when they were violated, international law was violated.

52. The rules of the organization were described as including its constituent instrument, internal regulations and other rules and the decisions adopted by its organs. These rules were also described as including the treaty establishing it, its statute, or any "other instruments governed by international law" by which it had been established, such as a General Assembly resolution, as well as the regulations based on those constituent instruments, including the organization's own practice. It was suggested that since the reference to the rules of the organization would take into account not only the rules of internal law but also its established practice, it was important to clearly indicate the extent to which established practice was decisive for the purposes of attribution, when it departed from the organization's constituent instrument.

53. It was suggested that the reference to the "rules of the organization" should be sufficiently broad to encompass the wide variety of rules of the existing international organizations. The reference to those rules, which set out the personality of the organization, its mandate and its powers, would help to

differentiate between the powers and responsibilities of the many and various organizations in existence.

54. It was also suggested that the concept of "international legal capacity" should be taken into account with regard to the attribution of conduct. The rules of international organizations were likely to define the precise limits of the international legal capacity of each organization, in other words, the range of rights and obligations conferred on an organization by its member States. The Commission should also compare the situation of an organization acting *intra vires* and *ultra vires*, in relation to the possibility of a member State incurring international responsibility for an internationally wrongful act of an organization.

55. It was further suggested that steps must be taken to prevent an international organization from trying to evade responsibility for the conduct of an entity which was in fact acting as one of its organs by simply denying that the entity was an organ according to the rules of the organization. Consequently, it would be necessary to establish objectively or on the basis of the views of third parties the standing of the individual or entity acting for the account or on behalf of the organization.

6. Question (b): Adequacy of the definition of "rules of the organization" contained in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

56. A number of delegations supported using the definition contained in the Vienna Convention for the following reasons: The definition seemed to provide a reasonably concise and comprehensive delimitation. The definition embodied the main normative means by which international organizations regulated their internal operations and other questions relating to their activities. In attributing conduct to international organizations, the only rules to be taken into account were those of a normative character with special legal significance, and that should be reflected clearly in the draft articles. The reference to "established practice", which was an important factor in determining attribution, would cover organs or entities acting de facto on behalf of the organization concerned. The definition would permit a proper differentiation of the international responsibilities of each organization, preserve the individuality of each organization and not prejudge the degree of systematization required in order for the rules to constitute a genuine internal order of the organization. It would be in the interest of achieving standardization and a form of codification that left no room for reopening the discussion of issues on which agreement had already been reached.

57. Some delegations felt that it was important to carefully examine the validity of the definition of the Vienna Convention in the current context for the following reasons: The complexity of the varying structures of international organizations necessitated a very careful approach, particularly in evaluating the decision-making capacity or authority and control exercised by members of such organizations. It should also be borne in mind that the definition of "rules of the organization" should have the broadest possible application to international organizations as they differed in their sizes, objectives, as well as in their membership.

58. Taking into account the fact that the definition contained the words "in particular", other components of the rules of the organization might be considered

with a view to formulating a more exhaustive definition. In addition, the reference to the established practice of the organization required further attention. It was suggested that the ILC could consider the clarifications on the subject given by the Institute of International Law in the resolution adopted in Lisbon in 1995.

59. Other delegations felt that the definition contained in the Vienna Convention was not satisfactory for the following reasons: A State could not invoke a rule of its internal law to justify its failure to comply with an international obligation, and similarly, an international organization could not invoke one of its internal operating rules to justify an act entailing responsibility. Furthermore, in matters involving responsibility it was desirable to have the widest possible sphere of application. The term "constituent instrument" used in the Vienna Convention was limitative and might lead to confusion, since it was only one of the forms that the treaty establishing an international organization could take. It would be preferable to use a more general formula that specifically mentioned the operating rules of the organization.

7. Question (c): Extent to which the conduct of peacekeeping forces is attributable to the contributing State and to the United Nations

(a) General remarks

60. Several delegations noted the complexity and the sensitivity of the question of the extent to which the conduct of peacekeeping forces was attributable to the contributing State or to the United Nations. It was noted that the question could arise in connection with other international organizations that assisted the United Nations in peacekeeping missions as well as regional or other organizations that might also be active in that field.

61. A number of delegations emphasized the need for a thorough study of the question before preparing draft articles, including careful consideration of the practice of the United Nations and other international organizations, the agreements between international organizations and contributing States, as well as the practice of States hosting such operations and the practice of the Security Council, the agreements dealing with claims in specific places and the existing incipient arbitral practice. Guidance could also be sought from the United Nations Secretariat.

62. A number of delegations also expressed the view that consideration of the question should be postponed until after the Commission and member States had gathered sufficient information and the Commission had established the general principles. The conditions for attributing acts of an international organization to its member States and other general questions concerning the responsibility of international organizations should be decided in the first instance, while specific situations such as responsibility for activities undertaken within the framework of peacekeeping operations was not a matter of first priority. Peacekeeping missions could vary greatly and it would be advisable not to become mired in complex concrete cases before elaborating general criteria. Even if forces were considered to be subsidiary organs of the United Nations, some of their activities could not be attributable to the Organization. It would be preferable for the ILC to concentrate on elaborating general criteria for the definition of organs of an international organization, on the basis of which it could be decided, on a case-by-case basis, to which entity the activities of the peacekeeping forces were attributable. Attention

was drawn to the comparable situation addressed in article 8 of the draft articles on State responsibility, concerning the attribution to a State of the conduct of organs placed at its disposal by another State.

(b) The term "peacekeeping forces"

63. The view was expressed that the term "peacekeeping forces" covered different types of forces operating in different relationships with very different organizations which might have widely differing mandates, powers and structures. It was suggested that the definition of peacekeeping forces for the purpose of attribution of conduct must distinguish, for example, between the responsibility of an international organization when the peacekeeping force was deployed at the invitation of the host State and when the mission was deployed pursuant to a Security Council decision.

(c) Legal personality

64. The view was expressed that the point of departure must be that the international responsibility of the United Nations for the activities of its forces was correlative to the legal personality of the Organization as bearer of international rights and obligations. Since the inception of peacekeeping operations, the United Nations had settled claims resulting from damage caused by members of the force in the performance of their official duties, which for reasons of the immunity enjoyed by the Organization and its members could not be submitted to local courts. Similarly, when an operation authorized under Chapter VII of the Charter of the United Nations was being conducted under national command and control, international responsibility for the activities of the force was borne by the State or States conducting the operation.

(d) Charter of the United Nations

65. The view was expressed that there was no case law on the issue of responsibility for the conduct of peacekeeping forces, because the Charter had no provisions on peacekeeping operations and did not envisage any use of force by the United Nations against States. There had been a legal controversy relating to the competence of United Nations organs to take decisions relating to the establishment of peacekeeping operations and the obligation of States to contribute to such operations. In the absence of a clear provision in the Charter, it was difficult to determine whether the conduct of peacekeeping forces was attributable to the troop-contributing State or to the United Nations.

(e) Rules of the Organization

66. Where the force acted within the "rules of the Organization", the logical conclusion would be that the legal responsibility fell to the United Nations, since in most cases the presence of the force and its access to the territory of a State were a consequence of the consent given to the Organization by the territorial State. However, a variety of factors might need to be considered in any given case, including the rules of the Organization, its practice, the question of effective control and the existence of a relationship agreement.

(f) Mandate of the operation

67. The view was expressed that the conduct of peacekeeping forces would be attributable to the United Nations if the acts or omissions had taken place within the strict framework of a United Nations mandate. If the injured State demonstrated that a violation by peacekeeping troops was an infringement of their United Nations mandate, the conduct in question should be attributed to the contributing country.

(g) Authority, command and control

68. A number of delegations identified the principle of "effective control" as a decisive factor in determining whether responsibility was incurred by the State or the organization. A key issue to be considered was the extent to which the United Nations controlled the conduct of the individuals in question, particularly since the context was different from that envisaged in article 8 of the State responsibility draft. Responsibility for wrongful acts or omissions by peacekeeping forces should prima facie or in principle be attributable to the United Nations rather than to Member States when the Organization had effective control over the force which was under its authority and command. It was suggested that the key concept to be studied was operative or operational control.

(h) Specific agreements

69. A number of delegations drew attention to various agreements concluded between the Organization and States which contained provisions concerning the attribution of the conduct of peacekeeping forces, including status-of-forces agreements, status-of-mission agreements or host-country agreements. The view was expressed that, in principle, the attribution of such conduct to the United Nations would be the general rule provided that the conduct was based on a status-of-forces or status-of-mission agreement. The view was also expressed that the extent to which the conduct of peacekeeping forces was attributable to the contributing State and to the United Nations would depend on the circumstances of the case and the arrangements made between them. The United Nations might consider the personnel provided by Member States to be experts performing missions for the United Nations as defined in the 1946 Convention on the Privileges and Immunities of the United Nations. In that case, it would appear logical to attribute responsibility for their actions to the United Nations. However, in other cases it might be clear that national contingents were acting on behalf of the sending State.

(i) Official or private conduct

70. The view was expressed that a clear distinction must be drawn between the conduct engaged in by peacekeeping personnel in connection with their mission, on the one hand, and in their private lives, on the other. In the first case, the United Nations could incur responsibility, whereas in the second the responsibility would lie with the contributing State, although the latter could bring an action against the author of the harmful conduct. However, the latter question fell within the sphere of internal law. In that connection, the Commission could also draw upon the responsibility regime established in the agreements between the United Nations and contributing States.

(j) Concurrent responsibility of Member States

71. A number of delegations drew attention to the need to consider the possibility of the concurrent responsibility of the United Nations and of the Member States contributing military, police or civilian contingents for peacekeeping operations under its control, taking into account the great diversity of peacekeeping missions.

72. It was suggested that in certain cases conduct should be attributed concurrently to the United Nations and to the contributing State. It was also suggested that it would be necessary to examine the possibility of regulating the question of concurrent responsibility in cases where the Organization assumed international responsibility vis-à-vis the host State but where the wrongful act was due to gross negligence or wilful misconduct by members of national contingents in the United Nations force. It was further suggested that in joint operations where one or more States provided forces in support of a United Nations operation, although not necessarily as an integral part thereof, it would be necessary to resort to the modalities of cooperation, including operational command-and-control arrangements between the States and the Organization, and to conduct an analysis of the activities that had led to the wrongful act. However, it was noted that there might be cases where the United Nations and contributing States could not have joint or concurrent responsibility; that would depend largely on the relationship between those States and the Organization and on the effective control exercised in any given situation. The general goal was to elaborate rules guaranteeing that the wrongdoing party, whether an international organization or a State, could be held to account in such circumstances.

73. The view was expressed that two issues required consideration: the proportional distribution of responsibility between the United Nations and contributing States for damage caused by United Nations personnel in the course of peacekeeping operations as a result of acts which were not prohibited by international law, and the attribution of responsibility for damage caused by a breach of the norms of international law and the mandate of a given operation. In the first case, the responsibility incurred by contributing States would be divided among them according to the extent to which their contingents had actually participated in the activity linked to the damage caused. In the second case, the starting point should be the mandate of the peacekeeping operation, the efficiency of the general leadership and the control exercised by the United Nations during the operation. The responsibility of a State for damage caused by a breach of the rules of international law by its contingent and the requirements of the mandate of the operation could be secondary or residual in character in relation to the responsibility of the United Nations, provided that the State concerned had not intervened directly in the operations in question.

(k) Legality or illegality of the operation

74. It was considered necessary to conduct a thorough study of the issue of the legality or illegality of the operation. If the Organization decided to approve an illegal military operation, it should assume the corresponding responsibility, together with the States carrying out the operation, irrespective of whether it exercised effective control or not.

B. Diplomatic protection

1. General comments

75. The Commission was commended for its work on the topic of diplomatic protection during the fifty-fifth session. Many speakers noted the level of progress reached during the session and supported the Special Rapporteur's intention to submit his final report on the topic in 2004 so that the draft articles could be concluded within the quinquennium. It was reiterated that the aim should be to codify secondary rules in the area of diplomatic protection, which was a special instance of the law of the international responsibility of States, involving the discretionary right of the State concerned.

2. Comments on specific articles adopted on first reading at the fifty-fourth session, 2002

Article 4 [9]

76. Concerns were raised regarding article 4 on continuous nationality. The view was expressed that the draft article deviated from the rule of customary international law in two respects. First, it shifted the end point of the continuity requirement from the date on which the claim was resolved to the date on which it was presented. Second, it left open the question of whether the continuity requirement applied during the period between the injury and the end date, whether that was taken to be the date of presentation or the date of resolution. It was suggested that the Commission revise draft article 4 so that it more closely reflected customary international law.

Article 7 [8]

77. The view was expressed that the requirement of both lawful and habitual residence set too high a threshold and could deprive stateless persons and refugees of effective protection. Others were of the view that the principle that a State might exercise diplomatic protection in respect of stateless persons or refugees was not based on practice, was contrary to the 1967 Protocol to the Convention relating to the Status of Refugees of 1951[1] and had no basis in the Convention on the Reduction of Statelessness[2] of 1961. Still others were prepared to consider draft article 7 as an example of progressive development of international law.

3. Comments on specific articles adopted on first reading at the fifty-fifth session, 2003

78. Several speakers welcomed the Commission's adoption of draft articles 8, 9 and 10 on the exhaustion of local remedies rule and the commentaries thereto. It was noted that the draft articles gave the State where a violation of international law had occurred the opportunity to redress the violation by its own means.

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[1] United Nations, *Treaty Series*, vol. 606, p. 267.

[2] Ibid., vol. 189, p. 137.

Article 8 [10]

79. The view was expressed that the provision did not appear to closely reflect customary international law. For example, the requirement that the injured person pursue only the remedies available "as of right" was considered overly narrow. It deviated from the rule of customary international law requiring the injured person to pursue all potential remedies, including those available only at the discretion of the highest judicial or administrative court. Others were of the view that the draft article adequately expressed the customary norm of exhaustion of local remedies, although it was unclear whether recourse to a jurisdiction that was not national, but was open to all nationals of the State, would have to be exhausted before a State could exercise diplomatic protection. As regards paragraph 2, the view was expressed that it was not clear whether it would cover resort to an ombudsman.

Article 9 [11]

80. A question was raised as to whether the specific reference to a "request for declaratory judgement" should be retained. It was suggested that the sole decisive criterion in that context was whether or not there was direct injury to the State; the introduction of a possible further criterion would only create confusion. In addition, the provision seemed to suggest that a "request for a declaratory judgement" was to be distinguished from any other "international claim". It was thus suggested that that criterion should be deleted from the text of the draft article and dealt with exclusively in the commentary. It was also observed that the provision did not specify what factors would make it possible to gauge the predominance of the indirect injury.

Article 10 [14]

81. While paragraph (a) was deemed satisfactory, it was observed that it would have been preferable if the requirement had been made part of the rule rather than expressed in the form of an exception. Others queried whether the standard adopted for the futility exception accurately reflected customary law. The view was expressed that the threshold above which local remedies would be presumed exhausted was too low: the phrase "no reasonable possibility of effective redress" was wider than appropriate and should be replaced by something along the lines of "obvious futility". It was also suggested that, for the sake of uniformity, paragraph (a) should contain a reference to the *availability* of local remedies similar to that in article 44, paragraph (b), of the Commission's articles on the responsibility of States for internationally wrongful acts of 2001.[3] It was further observed that the assumption must be that the judicial system of any State was capable of providing reasonable legal remedies, and that there should be no subjective prejudgement negating the fairness and effectiveness of the injuring State's legal remedies.

82. As regards paragraph (b), it was suggested that delay should be taken into account only when it was tantamount to a denial of justice.

83. Regarding paragraph (c), support was expressed for the inclusion of the requirement that local remedies need to be exhausted only if there is a "relevant connection" between the injured individual and the State alleged to be responsible.

[3] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

It was noted that even outside the field of transboundary environmental harm there were numerous situations where acts of States had extraterritorial effects and caused injury to individuals abroad. However, it was also suggested that the formulation did not accurately express the exception under customary law as discussed in the commentary. It was proposed that the Commission could elaborate a more precise definition of the term "relevant connection". As regards the second exception, relating to the unreasonableness of requiring the exhaustion of local remedies, the view was expressed that was vague and overly broad. It was noted that, while it offered the court presiding over the dispute the benefit of a discretionary ruling, it could open the door to an arbitrary expansion of the application of exceptions. It was suggested that, since the criterion concerning a reasonable possibility of effective redress in paragraph (a) was already broad, the second exception in paragraph (c) ought to be deleted. It was further suggested that the Commission could note in the commentary the pertinence of the *ad impossibilia nemo tenetur* rule. Drafting suggestions included: inserting the words "or impossible" after "unreasonable", in order to take into account the case mentioned in paragraph (11) of the commentary, where a State denied an injured alien entry to its territory; and replacing the phrase "criminal conspiracies" in paragraph (11), which was considered unclear, with "criminal activities".

84. As for paragraph (d), it was suggested that waiver should be express since allowing for a tacit waiver was a dangerous course to follow.

4. Comments on draft articles discussed at the fifty-fifth session, 2003

85. Concerning the diplomatic protection of legal persons, speakers referred favourably to the Commission's reliance on the principles derived from the judgement of the International Court of Justice in the *Barcelona Traction* case.[4] Some noted that, while the *Barcelona Traction* case provided an adequate basis, the rules set out therein were not entirely satisfactory and were typically remedied through the conclusion of bilateral and multilateral investment treaties. It was also observed that the diplomatic protection of corporations and other legal entities was complicated by the existence of transnational corporations, whose activities by definition encompassed several countries, and by the fact that shares of corporations changed hands very rapidly, with the resulting change of nationality of the shareholders.

Article 17

86. Support was expressed for paragraph 1, which was considered to be in conformity with the principles of the *Barcelona Traction* case. With regard to paragraph 2, support was expressed for the proposal to use the place of incorporation and registered office as the decisive link for purposes of diplomatic protection, although some speakers would have preferred the State of the domicile or *siège social* of the company. Others would have preferred only the place of incorporation. It was also observed that the text which had emerged from the Working Group contained too many possible alternatives to be helpful. Indeed, some speakers expressed a preference for a formulation along the lines of that initially proposed by the Special Rapporteur.

[4] *Case Concerning the Barcelona Traction, Light and Power Company Limited, I.C.J. Reports, 1970*, p. 3.

87. As for the phrase within square brackets, while some preferred deleting it entirely, others preferred to remove the brackets and to replace the word "and" with "or". Still others preferred retaining the cumulative criteria of place of incorporation "and" place of registered office, since the combination of the two criteria could serve to restrict resort to incorporating in tax havens. The view was expressed that in the light of the current state of international economic relations, it was not sufficient simply to use the formal criterion of the law of the country where the corporation had been incorporated, but that there should also exist a genuine link between the corporation and the country under whose law it had been incorporated. Others preferred not to follow the "genuine link" doctrine since the lifting of the "corporate veil" would create difficulties for courts and States of investment and it was necessary to avoid a formula that might suggest that a tribunal considering the matter should take into account the nationality of the shareholders controlling the corporation. It was also noted that no genuine link had been required in the *Barcelona Traction* case, the Commission had not imposed a genuine link requirement on natural persons and, in the light of the discretionary nature of the right of diplomatic protection, the genuine link was one of the factors that a State took into account when deciding whether to endorse the claims of the corporation against the State that had caused the injury.

88. The following drafting suggestions were made: replacing the text of article 17 with: "For the purposes of diplomatic protection, in respect of an injury to a corporation, the State of nationality is that according to whose law the corporation was formed[5] and with which it has a close and permanent connection", and adding the following phrase in order to take into account the case of a corporation which had a closer connection with a country other than the country according to whose law it was formed: "If a corporation has a closer and more permanent connection with a State other than the State according to whose law it was formed than with that latter State, for the purposes of diplomatic protection its State of nationality shall be the first-mentioned State", adding a third paragraph which would read: "For the purposes of the preceding paragraph, the nationality of the shareholders, the State in which the corporation has its basic economic activity or any other element which reflects the existence of a genuine link between the corporation and the State in question shall be taken into account"; or rendering the provision as: "For the purposes of diplomatic protection, the State of nationality of a corporation is the State under whose laws it is incorporated and in whose territory it has its registered office".

Article 18

89. Support was expressed for the article, which was considered to be in conformity with the *Barcelona Traction* case. The view was expressed that the provision set forth reasonable and practicable exceptions in situations where the shareholders might otherwise be left without any State protection of their legitimate interests. Others were of the view that the provision did not reflect customary international law and directly contradicted the rule stated in draft article 17 by introducing too broad an exception, with the effect that in too many cases the

[5] The phrasing "the corporation was formed" was proposed as an alternative to "incorporation", which was considered difficult to render in some languages.

"corporate veil" would be lifted to enable the State of nationality of the shareholders to exercise diplomatic protection in their favour against the State of nationality of the corporation. The concern was expressed that the provision led to confusion in cases of multiple shareholders of different nationalities, especially as shareholders could change very often. It was also pointed out that, given the distinction between rights and interests made by the Court in *Barcelona Traction*, the mere fact that both the company and the shareholders had sustained injury did not mean that both had the right to require or seek reparation.

90. It was proposed that the chapeau should be reformulated to read: "The State of nationality of the shareholders in a corporation shall be entitled to ..." Support was expressed for paragraph (a), which was considered to be in accordance with the approach taken in the *Barcelona Traction* case, namely that the company's status in law was alone relevant and not its economic condition or the possibility of its being practically defunct. It was suggested that the reference to "ceased to exist" should be clarified as meaning that only changes in legal status should be considered, and that a time limit for the exercise of diplomatic protection on behalf of the shareholders should be established. It was suggested that the point should be made in the commentaries to both article 17 and article 18 that article 17 would cease to apply to a corporation when the latter ceased to exist, so as to clarify the temporal connection between article 17 and article 18, paragraph (a). It was further suggested that paragraph 18 (a) could be aligned with the principle of continuous nationality as contained in draft article 20 so as to avoid situations in which multiple States might claim the right to exercise diplomatic protection with respect to the same injury. It was also proposed that the words "the place of its incorporation" should instead read "the State of its incorporation".

91. Some support was also expressed for the exception in paragraph (b), by way of progressive development of international law. Indeed, it was noted that the situation envisaged in the paragraph had been a major concern for investing States and was mainly addressed by bilateral investment treaties. Others expressed the concern that the provision constituted a glaring exception to the rule in draft article 17. In addition, the exception would cause considerable practical difficulties, owing to the difficulty of knowing who the shareholders of a corporation were, and could jeopardize the principle of equal treatment of national and non-national shareholders. It was further suggested that the provision should include the requirement that the corporation that had ceased to exist had been obliged to be incorporated in that State's territory under its law.

Article 19

92. While several speakers expressed support for the draft article, the view was expressed that a distinction should not have been made between direct and indirect injury but that, instead, the distinction between rights and interests of shareholders should have been taken as the reference point. It was also suggested that the provision should be incorporated into article 18. Others preferred to keep the provision in a separate article as a saving clause to protect shareholders whose own rights, as opposed to those of the company, had been injured.

Article 20

93. Support was also expressed for the article as reflecting an established rule equally applicable to natural and legal persons.

Article 21

94. With regard to article 21 on *lex specialis*, support was expressed for the proposal to delete the draft article and leave the issue to be dealt with in the commentary. Others preferred having the provision reformulated and located at the end of the draft articles as a "without prejudice" clause, applicable to the draft articles as a whole. It was proposed that the last part of the draft article could accordingly be reformulated to read "without prejudice to special rules of international law". Other suggestions were to model the provision on article 55 of the articles on the responsibility of States for internationally wrongful acts, so that it would read: "These articles do not apply where and to the extent that the protection of persons is governed by special rules of international law"; and including, for reasons of legal certainty, a provision clarifying the relationship between the articles at issue and the rules laid down in international treaties on the settlement of disputes between investors and States, to appear in the specific chapter on legal persons.

95. Some speakers observed that it was not clear whether rules relevant to the international protection of human rights would be covered. It was proposed that a provision should be included in the final clauses stating that diplomatic protection was subsidiary to special regimes for the protection of investments or of human rights, provided the protection afforded under a special regime was guaranteed by a binding decision, such as a judicial decision or an arbitral award. If the protection thus afforded was not satisfactory, diplomatic protection could come into play.

Article 22

96. Support was expressed for the inclusion of article 22 on the application, mutatis mutandis, of the provisions on diplomatic protection of corporations to other legal persons. Since it would be difficult to cover all the various legal entities in one article, it would be more practical to draft an article that would permit a certain degree of flexibility in its application rather than to attempt to categorize the variety of legal persons stipulated in the domestic laws of many countries. It was observed that the lack of State practice in the area was not an obstacle, given the continued increase in the number of legal persons, other than corporations, which operated in States other than their State of nationality and which could suffer injury resulting from internationally wrongful acts committed by the State in which they operated. Various suggestions for improving the article were offered, including: emphasizing that diplomatic protection could only be offered to other legal persons for the purpose of defending their property and commercial rights vis-à-vis third States; and including a requirement of mutual recognition of the legal personality of a given entity by the States concerned. The view was also expressed that there were good reasons for not extending the application of diplomatic protection to non-governmental organizations, which in most cases did not maintain sufficient links with the State of registration in the exercise of their international functions and therefore could not request protection. Others preferred that a more thorough examination of the issues involved be undertaken, in view of the lack of State practice. It was noted that the proposed text, rather than clarifying the question of

protection for legal persons other than corporations, introduced greater uncertainty. It was thus suggested that the issue should be excluded from the scope of the draft articles and that it be dealt with in a "without prejudice" provision located in the general part of the articles which could state that the provisions were without prejudice to the exercise of diplomatic protection in the case of injury to a legal person other than a corporation.

5. Comments on specific issues raised in the Commission's report

Protection of ships' crews

97. With regard to the diplomatic protection of members of a ship's crew by the flag State, an issue singled out for specific comment by the Commission in paragraph 28 (a) of its report, many speakers did not support the inclusion of such rules in the draft articles. It was observed that it was important not to inadvertently undermine the principles of legal certainty and predictability with regard to the law of the sea and maritime affairs, and that there was little added value in attempts to explore new rules of diplomatic protection not derived from the law of the sea and other relevant areas of the law. Instead, it was stated that the question of the protection of crews by States could be adequately resolved within the context of special international treaties, as provided, for example, in article 292 of the United Nations Convention on the Law of the Sea (UNCLOS).[6] The view was also expressed that *The M/V "Saiga"* case[7] had to be viewed in the context of article 292, which called for the prompt release of vessels and their crews, and therefore, as a *lex specialis*, could not be said to have enlarged the scope of diplomatic protection. Expansion of States' right to intervene under such conditions was said to risk weakening the principle of nationality, which was the basis for diplomatic protection.

98. Others welcomed the Special Rapporteur's intention to deal with the diplomatic protection of members of a ship's crew, which would give timely guidance on an important practical issue that was not explicitly covered by UNCLOS. Support was expressed for the assertion that the flag State should have the right to protect the members of a ship's crew in the event that the State of nationality was unable to exercise that right. It was also pointed out that there existed a practice of concurrent or mixed claims being made based both on the exclusive jurisdiction of the flag State and on diplomatic protection. In cases in which an aircraft had been shot down, there had been instances in which the registered State of the aircraft as well as the States of nationality of crew members and of passengers had simultaneously filed claims against the country which had caused the incident.

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[6] See *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.97.V.10).

[7] *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgment of 1 July 1999, para. 172.

Protection of employees of an intergovernmental organization

99. Concerning the diplomatic protection of nationals by an intergovernmental international organization in the context of the *Reparation for Injuries* case,[8] a further issue slated for comment by States in the Commission's report, the view was expressed that there was no need to examine in the draft articles the problem of international organizations which protected their personnel, since that involved functional responsibility, which was linked to the specific rights and interests of those organizations. A preference was thus expressed for confining the scope of the draft articles on diplomatic protection to the traditional boundaries of nationality of claims and exhaustion of local remedies and to customary international law, under which the State had full discretion in the exercise of diplomatic protection. It was also noted that since the Commission had agreed to exclude the protection of diplomatic and consular officials from the scope of the topic, the same logic would apply to officials of international organizations. It was observed that the Commission could usefully clarify the issue of the conflict of competing rights to diplomatic protection between the State of nationality of the agent and the organization. It was suggested that the decisive criterion should be whether the internationally wrongful act had been directed predominantly against the organization or the State of nationality of the acting agent; or that the person employed by an international organization had a permanent link with the organization in the sense of being an international civil servant, so that the primary right to protect the person would belong to the organization, and only subsidiarily to the State of nationality. It was also observed that since functional protection was based not on the nationality of the victim but on his or her status as an agent of the international organization, any claim for injury not related to such status should be taken up by his or her State of nationality.

Other issues

100. The following suggestions were made in reply to the question raised in paragraph 29 of the report as to whether there were any other issues which ought still to be considered by the Commission in the draft articles: the question of diplomatic protection where a State or an international organization administered a foreign territory or State, in particular who should exercise diplomatic protection in respect of persons from that territory suffering injury abroad, and against whom the State of nationality could exercise its right of diplomatic protection when foreign nationals suffered injury in the administered foreign territories or States; and the extent to which the draft articles applied to human rights violations, since the State of which an individual was a national did not necessarily play the same role as it did in relation to a breach of obligations concerning the treatment of foreigners. Others preferred not to include any further issues in the draft articles.

[8] *Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Reports, 1949*, p. 174.

C. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

1. General comments

101. Several delegations welcomed the first report of the Special Rapporteur on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/531). Delegations took note of the general preference of States for civil liability regimes which were sectoral or depended on the nature of the activity involved. It was also noted that although a number of instruments had been elaborated in recent years, their impact was rather limited, as only a small number of States were parties to such instruments.

102. Some delegations welcomed the conclusions and findings contained in the report of the Special Rapporteur, noting that they provided a sound basis for any further exploration of the topic. In that regard, further work was also urged on the relative level of success or failure of the various instruments, as well as on national legislation and domestic and international practice. A study to determine the extent to which recent environmental disasters were the result of a violation of the duty of prevention was also favoured.

103. Support was expressed for the broad policy considerations underpinning the Special Rapporteur's conclusions and findings, including the basic consideration that, to the extent feasible, the victim should not be left to bear loss unsupported.

104. Delegations emphasized that States should have the necessary flexibility to develop schemes of liability suited to their particular needs, taking into account also the needs of other States and victims of hazardous activities, as well as recent instruments adopted and current developments concerning negotiations of liability regimes.

105. Some delegations also expressed support for the indication by the Special Rapporteur that States have an obligation to ensure that some arrangement exists to guarantee equitable allocation of loss. A model of allocation of loss that would be general and residual in character received support, noting that it would help to shape more detailed regimes for particular forms of specially hazardous activity.

106. On the other hand, while acknowledging the need for effective liability mechanisms, doubt was expressed as to whether there was support among States for the development of a general international legal regime on liability. In that connection, doubt was expressed as to whether States had a duty to ensure that some arrangement existed to guarantee equitable allocation of loss, as had been suggested by the Special Rapporteur in his report. It was pointed out that while States should continue to provide for the liability of private operators in appropriate circumstances, there was no international legal obligation to do so. It was reiterated that the general approach to the international regulation of liability should be to proceed in careful negotiations on the basis of particular sectors or regions.

2. Scope

107. The need to clearly distinguish the scope of any liability regime dealing with acts not prohibited by international law from unlawful acts under the law of State responsibility was emphasized by some delegations. Furthermore, it was stressed that the elaboration of rules for liability should take into account existing rules at the national level.

108. In that connection, delegations affirmed their support for the principle that the liability regime to be proposed by the Commission should be without prejudice to State responsibility under international law. In addition, support was expressed for a liability regime that was without prejudice to civil liability under national law or under rules of private international law.

109. Given the relationship between prevention and liability, as well as the need to maintain compatibility and uniformity, several delegations supported the idea that the scope of the topic should be the same as that of the draft articles on the prevention of transboundary harm from hazardous activities. In that regard, some delegations stated that the same threshold of "significant harm" as defined in the draft articles on prevention should be maintained for the liability aspects.

110. Several delegations stressed that any future regime should guarantee, to the maximum, compensation for harm caused to individuals and the environment. Support was expressed for the definition of "harm" that would include any loss to persons and property, including elements of State patrimony and natural heritage as well as environment within the national jurisdiction.

111. The point was also made that since damage could not be physically traced back to the operator, any reliance on strict liability excluded a broader definition of environmental harm. Moreover, the effective application of liability provisions presupposed that the term "damage" would be narrowly defined.

112. While acknowledging that the scope of the present work should be limited to that of the draft articles on prevention, some delegations regretted the exclusion of damage to the global commons. It was thus suggested that harm to the global commons should be considered at some future point.

3. Role of the operator

113. Several delegations agreed with the approach proposed by the Special Rapporteur that the operator should bear primary liability. It was recognized that the person most in command and control of the activity would bear primary liability for redressing any harm caused. In justification, it was observed that in most cases the operator was the main beneficiary of the activity, the creator of the risk and the entity in the best position to manage the risk. In addition, it was emphasized that assessing liability to the entity most in command and control of the hazardous activity was in line with the "polluter pays" principle.

114. It was also suggested, on the basis of the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, that the term "operator" should be broadly defined to include all persons exercising control of the activity.

(a) Procedural and substantive requirements of the operator

115. It was acknowledged that specific procedural and substantive requirements which States imposed on operators would vary from activity to activity. Nevertheless, it was suggested that the model for allocation of loss should consist of a set of procedural minimum standards, addressing such issues as standing to sue, jurisdiction of domestic courts, designation of applicable domestic law, and recognition and enforcement of judgements, as well as substantive minimum standards, including definitions, general principles (including that the victim, to the extent possible, should not be left to bear loss), the concept of damage, the causal connection between damage and the activity causing damage, basis of liability (fault liability, strict liability, absolute liability), identification of persons liable, including the possibility of multiple tiers of liability, limits of liability (time limits, financial limits) and coverage of liability.

116. Delegations stressed the primacy of requiring operators to obtain requisite insurance coverage as well as other financial guarantees. Some delegations suggested that such insurance should be mandatory. However, in view of the diversity of legal systems and differences in economic conditions, other delegations called for flexibility with regard to that question. It was also pointed out that an effective insurance system would require wide participation by potentially interested States.

117. It was also stressed that the State should ensure that operators were in a position to take prompt, effective action in order to minimize harm. Thus, the focus could be on contingency, notification and other plans for responding to incidents that carried a risk of transboundary harm. Moreover, it was necessary to improve public access to information as well as to develop mechanisms for public participation. It was further suggested that the strict civil liability of the operator should be supplemented by strengthening the obligation of States to adopt measures to prevent environmental harm on the basis of the precautionary principle.

118. On the other hand, the view was expressed that it would be sufficient for the purposes of the regime to provide a general obligation on States to provide in their national legislation rules governing the liability of the operators and the obligation to compensate, including the consideration of minimum threshold for the implementation of that obligation.

(b) The basis and limits of allocation of loss to the operator

119. With regard to use of terms, it was stated that although the term "allocation of loss" to the operator had made it possible to overcome conceptual difficulties, it needed to be further clarified and its implications understood in relation to traditional liability regimes, which were based on "damage". Some delegations noted that the objective of liability regimes was not actually allocation of loss but allocation of the duty to compensate for damage deriving from acts not prohibited by international law. Indeed, it was suggested that familiar terms such as "damage" and "compensation" should be employed. It was also observed that "allocation of loss" appeared to deviate from the "polluter pays" principle and the principle that the innocent victim should not be left to bear loss.

120. Concerning the basis of liability of the operator, several delegations spoke in favour of a strict civil liability regime. It was noted that such an approach was in

line with various international agreements on liability, as well as the "polluter pays" principle. However, the view was also expressed that strict liability should be approached with caution. Although it was well recognized in domestic legal systems, it could not be stated that it was well accepted or understood as a desirable policy in the context of transboundary harm.

121. Doubt was also expressed as to whether international law should intervene in apportioning loss among the various actors. In principle, there was a preference for leaving resolution of the matter to domestic legal systems.

122. In relation to exceptions to strict liability, it was suggested that the liability of the operator should be subject to the usual exceptions, including those concerning armed conflict or natural disaster.

123. Support was also expressed for limits on liability of the operator. It was explained that such limits were necessary since the use of technology capable of causing transboundary harm might have serious consequences for the functioning of economic and other social systems and would affect substantial individual interests. Consequently, it was observed, time or financial limits should only be available to the operator if (a) such limits were necessary to ensure that coverage of liability was available at reasonable cost, and (b) international or domestic arrangements provided for supplementary sources of funding.

124. Concerning the level of financial limits, it was pointed out that ceilings needed to be set at reasonably significant levels, in order to reflect that the operators were beneficiaries of the activity as well as to internalize, to the extent possible, associated costs. The remark was also made that financial limits would make insurance and additional funding mechanisms feasible.

125. Support was furthermore expressed for the imposition of time limits within which a suit might be brought.

(c) Causation

126. Recognizing the complicated scientific and technological elements associated with hazardous activities and the consequent burden placed on victims of harm caused by such activities, several delegations favoured the Special Rapporteur's suggestion that no strict proof of causal connection should be required to establish liability. It was stated that liability could arise once harm could be reasonably traced to the activity in question. Moreover, the view was expressed that in the absence of a waiver clause, there should be presumption of a reasonable causal link between the actions of the operator and the injurious consequences. Indeed, it was suggested that the burden of proving a causal link between the activity and the damage should not fall on the victim.

127. Having regard to the different activities to which the "test of reasonableness", as recommended by the Special Rapporteur, would relate, the point was made that the criteria for such test were not perfectly clear.

(d) Multiple sources of harm

128. Support was expressed for provision to be made for joint and several liability for cases where damage could be traced to several operators or when damage resulted from more than one activity.

4. The role of the State

129. Concerning the various possibilities available, it was observed that the liability of a State based on its duty to exercise due diligence in controlling sources of harm in its territory would effectively not deviate from State responsibility for wrongful acts under customary law and would add little to the law already in force. On the other hand, the establishment of a primary liability of a State under international law for the State in whose territory the hazardous activity was being conducted to compensate for any transboundary harm the activity had caused was considered unfair to such a State, since the activity was chiefly conducted by and benefited an operator. Thus, some delegations noted that State liability was largely an exception and applicable in few convention regimes. The view was expressed that if strict liability of the State was established as the overriding principle, States themselves could be left to develop formulas for the allocation of loss and mechanisms for funding.

130. The general approach that was favoured was to link the strict liability of the operator with some residual compensation regime involving the State. Although it was noted that, in principle, relevant losses should be borne by the operator or shared by the operator and other actors, some delegations maintained that a system based solely on the liability of the operator or other actors might not be sufficient to protect victims from loss.

(a) The nature and extent of State involvement and funding

131. Different scenarios envisaging a tier system were put forward regarding the involvement of the State. Some delegations suggested that the regime should include some degree of liability involving the State in cases where the operator was unable or unwilling to cover such loss, was insolvent, could not be identified, in certain well-defined cases where the liability of the operator was limited by insurance obligations or compensation was inadequate. It was also asserted that in the case where the operator was unable or unwilling to cover such loss, the regime should include "absolute State liability".

132. It was also suggested that a State should be involved as a last resort. Thus, the State would be liable on a residual basis for harm not covered by the operator unless collective arrangements provided for supplementary sources of funding or such sources were unavailable or insufficient. While noting the interest in a residual liability regime for States, the view was expressed that not all States authorizing hazardous activities had the means to pay residual compensation.

133. It was also pointed out that the involvement of the State to provide supplemental funds was justified on the basis of the fact that it had authorized the activity and that it had benefited from it, as well of the principle that the victim should not be left to bear loss unsupported.

134. Some delegations sought to establish a closer nexus between the operator and the State and suggested that harm not covered by the operator should be covered by the State to which the operator belonged or the State under whose jurisdiction or control the activity had been carried out.

135. In addition to providing back-up funding, it was proposed that the State should be obliged to do its utmost to enact legislation designed to prevent uncovered losses and to exercise due diligence in ensuring the effective enforcement thereof. The

view was also expressed that the residual liability of the State should consist principally in taking preventive measures and establishing funds for the equitable allocation of loss, rather than assuming residual liability when the responsible party was financially incapable of providing compensation.

136. Concerning the activities of the State qua operator, it was indicated that where the State itself was the operator or was directly and effectively related to the harmful operation, it should be treated as a private actor in relation to the allocation of loss.

(b) Types of supplementary sources of funding

137. Support was expressed for the use of additional funding mechanisms. Such compensation funds should be established by contributions from the private or the public sector; from beneficiaries of the activity in question, including industry and corporate funds on a national, regional or international basis; from the States concerned, including earmarked State funds.

138. It was further suggested that such funds should include existing multilateral funds, and funds from relevant national and international organizations, non-governmental organizations, and relevant insurance.

5. Coverage of harm to the environment

139. The point was made that the definition of "damage" eligible for compensation should be understood in the traditional sense as damage to persons and property, and that the proposal put forward by the Special Rapporteur, namely damage to persons and property, as well as damage to the environment or natural resources within the jurisdiction or in areas under the control of a State, provided a good working basis.

140. While accepting the proposed scope as proffered by the Special Rapporteur, the comment was made that in certain situations restoration of the environment was not possible and quantification difficult. Thus compensation for harm to the environment should not be limited to the costs of measures of restoration but should also include loss of intrinsic value.

141. Support was expressed for the implementation of measures of reinstatement. It was noted in that regard that coverage of the environment per se was an issue if there was no requirement to repair damage to the environment by means of reinstatement.

142. It was suggested that issues concerning the environment per se should be considered at a later stage. The view was also expressed that the question should best be treated in a framework concerned with the environment outside the work of the Commission.

143. Concerning coverage of economic loss, some delegations stated that the right to compensation should include economic loss suffered where a person's ability to derive income was affected by an activity, and should include loss of profit. The concept of economic loss should extend to loss incurred as a direct result of the perceived risk of physical consequences flowing from an activity even in the absence of such physical consequences.

6. Final form of work on the topic

144. It was generally noted that it was premature to discuss the final form of the Commission's work on the topic. However, the point was made that it could be useful for the Commission to decide at the outset whether it aimed to formulate a series of recommendations for States or to develop a general model instrument that could be applied in the absence of any specific treaty regime. In the case of the latter, it would be difficult for the Commission to move beyond a preliminary text that would do no more than ease negotiations by representatives of States.

145. Several delegations suggested that the final form on liability should not be different from that on the draft articles on prevention, and that both could be addressed in a single instrument. In that connection, some delegations expressed preference for a convention which would regulate the prevention of harm and provide for corrective measures to be taken, especially for the elimination of the harm and the compensation of those affected.

146. Regarding the Special Rapporteur's recommendation for a protocol on liability to a convention on prevention, reluctance was expressed, noting that the Commission should not ultimately take it up.

147. Other delegations favoured a soft law approach. A comprehensive study of the existing law with a set of recommendations was for example considered a realistic and achievable goal. It was also observed that the solution chosen would depend on the development of specific liability regimes in the future, so that the outcome might take the form of a "checklist" of issues which needed to be taken into consideration in future negotiations on the establishment of liability regimes for specific activities. Some delegations favoured guidelines or model rules for States.

148. Several delegations stressed that any result should include appropriate dispute settlement arrangements.

D. Unilateral acts of States

1. General comments

149. Different views were expressed with regard to the appropriateness of the topic for codification. Some delegations expressed their support for the continued consideration of the topic of unilateral acts of States, given the fact that they constituted a practice which gave rise to international obligations. There was a need for clear guidelines so that States would know when their unilateral expression would be considered legally binding. It was also stated that to refer to unilateral acts as a mere sociological phenomenon of State conduct was not in the interest of legal certainty and that such an approach would make it impossible to identify common legal rules in this field.

150. Some other delegations stated that although work on the topic had begun in 1996, the Commission had not yet moved beyond the discussion of methodology. Some delegations were of the view that the topic should be removed from the agenda of the Commission since the work on the topic had not contributed to increased legal clarity in that particular area.

151. With regard to the approach to the topic, it was stated that, given its complexity, the Special Rapporteur had rightly chosen to begin analysing the

various classic unilateral acts on the basis of rules applicable to all of them. According to another view, however, an attempt to establish a single set of rules for all unilateral acts was problematic. It was stated that a plethora of studies, as suggested by the Special Rapporteur, could only result in a delay of the adoption of draft articles setting out the general principles on the topic.

152. A different approach was suggested whereby as a first stage the Commission would list the autonomous acts to be taken into consideration, then address the issue of whether in addition to express acts, abstention and silence could, in some circumstances, also be included. Furthermore, the Commission would have to agree on whether to include implicit acts and estoppel and whether it was necessary to regulate acts which could be named or also "unnamed" acts. In other words, the Commission would have to determine whether the list of unilateral acts should be open-ended and whether it was essential to adopt general rules applicable to all unilateral acts on the list or specific rules for each act.

153. The point was made that the scope of the topic should be strictly monitored and that, accordingly, acts of recognition by acquiescence, those based on treaty and expressed through United Nations resolutions, and those emanating from international organizations should be excluded from consideration.

154. Some delegations also agreed that the lack of information on the part of States constituted one of the main obstacles to progress on the topic, while indicating that this was at least partly due to insufficient focus on the part of the Commission. It was also stated that in the absence of a systematic analysis of State practice, it would be difficult for the Commission to proceed with its work. While the point was made that more information on State practice was needed, it was also noted that in some cases it was extremely difficult to trace and identify relevant practice, while in others it was impossible to reply to the Commission's questionnaire since many Governments had no systematic procedures in that area.

155. It was also noted that the line between unilateral acts intended to formulate legal obligations of States and those adopted for political purposes was not always clear and that sometimes States wished to retain that ambiguity so as to avoid being legally bound by their unilateral declarations. It was also stated that making unilateral acts subject to a treaty regime might jeopardize their autonomous nature.

156. The point was made that modification, suspension and revocation of unilateral acts should not be conditional on facts such as whether such possibility was provided for in the act or whether there had been a fundamental change of circumstances.

157. Although some support was expressed for the approach of the sixth report of the Special Rapporteur, which focused on the particular unilateral act of recognition, it was said that a broader approach might have been more adequate. The point was also made that in dealing with recognition alone, the Special Rapporteur had already covered a wide range of rules which might be applicable to other types of unilateral acts. Alarm was expressed about the fact that, in the light of the recommendations of the Working Group, the report on the unilateral act of recognition would not be followed by further reports on the other three types of unilateral acts. However, doubts were expressed as to whether the unique problems relating to specific unilateral acts deserved further consideration by the Commission.

158. As regards the study on the unilateral act of recognition, it was stated that such an endeavour should be strictly limited to that topic and exclude controversial issues such as the legal requirements for recognition of a political entity as a State. Disagreement was also expressed with the view of the Special Rapporteur that the principle of *acta sunt servanda* constituted the basis for the binding nature of a unilateral act.

159. It was stated that the draft articles should address the case of unilateral acts undertaken jointly or in a concerted manner. Furthermore, the suggestion was made that the concept of the unilateral act of aggression should be included within the scope of the topic.

160. It was also proposed that the Special Rapporteur prepare new draft articles on the general characteristics common to all unilateral acts *strictu senso*, in addition to considering other categories of unilateral acts in order to establish their specific content.

2. Comments on the recommendations of the Commission

161. Some delegations supported the scope of the topic as defined by the Commission. In that connection, it was stated that the focus of the study should be how the *acta sunt servanda* principle applied, including assessing exceptions and conditions in its implementation.

162. Preference was expressed for focusing on the general and specific rules applicable to the various types of *strictu senso* unilateral acts. It was stated that the next report of the Special Rapporteur should consist of a presentation, as complete as possible, of the practice of States in respect of unilateral acts.

163. The recommendations of the Working Group, it was said, were somewhat unsatisfactory. This was the case, for example, with the definition of unilateral act contained in recommendation 1 of the Working Group, which included the term "consent", thus implying the existence of a bilateral relationship; preference in this regard was expressed for referring only to "statements expressing the will" or for the definition proposed by the Special Rapporteur in paragraph 81 of his first report.

164. However, other delegations endorsed the definition contained in recommendation 1, which clearly emphasized the intention of the State and also indicated that a unilateral act might produce other legal effects, such as retaining or acquiring rights. The definition, it was stated, should also highlight the importance of autonomy; the act should produce legal effects independent of any manifestation of will by another subject of international law.

165. Delegations had divergent views concerning recommendation 2. On the one hand, it was suggested that the Commission should restrict its work to unilateral acts *strictu senso*. In that connection, it was said that extending the scope of the study to include State conduct that might produce legal effects similar to those of unilateral acts could entail new difficulties because it would involve institutions of international law and topics that should be approached separately, such as humanitarian interventions and countermeasures. It would also require reconsideration of the six prior reports of the Special Rapporteur. In addition, it was said that, among the types of State conduct not considered unilateral acts, measures taken outside the jurisdiction of the State might be of interest and would not expand the scope of the study.

166. On the other hand, some delegations supported the content of recommendation 2. It was also suggested that the conduct of States referred to therein would include declarations of a State's accession to a treaty previously concluded by other States, a State's recognition of the compulsory jurisdiction of an international tribunal, silence, acquiescence and conduct expressed through United Nations resolutions, as well as the acts of international organizations. Furthermore, it was proposed that emphasis should be placed on conduct which evinced an intention to create legal obligations and on how to ascertain that intention. In that connection, it was stated that borrowing from municipal legal concepts might be of assistance.

167. Another view considered that recommendation 2 was perplexing since the conduct of States would cover a wide range of measures including unilateral acts that were not autonomous, others specifically provided for in treaties, as well as estoppel and failure to act, which did not fit the definition in recommendation 1; to embark on a study in pursuance of recommendation 2 might not constitute a good use of time. It was also stated that adhering to recommendation 2 would result in delaying the already slow progress in the work on the topic. It was pointed out that the conduct producing legal effects could be discussed in the commentaries or that the scope of the topic could be broadened subsequently.

168. In relation to recommendation 3, it was said that to determine the unilateral acts on which draft articles were to be proposed would render the definition contained in recommendation 1 more or less useless. Furthermore, it was said that the need for a different approach in the case of the study of conduct, as suggested in recommendation 2, which could result in the adoption of guidelines instead of draft articles was not clear since the legal effects were similar. The view was expressed that the Commission should aim for the elaboration of draft articles in both the case of unilateral acts *stricto senso* and that of the conduct referred to recommendation 2, leaving it for the General Assembly to decide at a later stage on their appropriate legal form. According to another point of view, the preparation of guidelines for the conduct referred to in recommendation 2 would suffice.

169. As regards recommendation 6, the point was made that the question of interpretation should be included since the rules of interpretation applicable to unilateral acts might differ from those applicable to international treaties.

E. Reservations to treaties

1. General comments

170. Several delegations stressed the importance of the Guide to Practice, which would fill a gap in treaty law and offer assistance to States parties concerning the handling of reservations, interpretative declarations and objections, without changing the regime of the Vienna Conventions. They also welcomed the adoption of 11 draft guidelines and model clauses on withdrawal and modification of reservations and interpretative declarations. Model clauses would serve as examples, which could be used as they stood or adapted, where States or international organizations were negotiating a treaty. Moreover, the commentaries to the guidelines should exceptionally form an integral part of the Guide, since the Guide to Practice required further clarification in order to ensure that the correct practice was always followed.

171. Several delegations also pointed out that Guide to Practice should be completed during the current quinquennium. Concerns were expressed about the draft guidelines becoming increasingly numerous, detailed and complex or about the time scale of the Commission for dealing with the important issues. The Commission should streamline the current guidelines, merging them wherever possible. The view was also expressed that there were two different categories of guidelines, namely interpretative guidelines to clarify provisions of the Vienna Convention and new commitments on the form of recommendations (as, for example, guideline 2.5.3 which required States to undertake a periodic review of the usefulness of reservations). It would therefore be useful to make it clear to which category each guideline belonged.

172. It was stated that the commentary to the explanatory note should be expanded to include observations on the nature of the draft guidelines as recommended practices as well as a statement that such recommendations might be of assistance in interpreting the Vienna Conventions. As for the model clauses, they should be placed in an annex, as the Special Rapporteur had suggested. The commentaries, although containing material of great historical interest, should focus on the measures on which the draft guidelines should be interpreted and applied.

173. The exchange of views between the Commission and the human rights treaty monitoring bodies on the issue of reservations was also welcomed.

174. With regard to conditional interpretative declarations, it was pointed out that they were nothing more than a particular category of reservations. The Special Rapporteur had adopted the right approach in deciding to continue to examine conditional declarations and reservations separately until the question of their lawfulness and respective effects had been determined. However, concern was expressed that modification of conditional interpretative declarations was subject to the unanimity rule applicable to late reservations, treating them thus more strictly than reservations.

175. It was also pointed out that some draft guidelines needed further consideration or redrafting: draft guideline 2.1.8 concerning the role of the depositary should be aligned with article 77 of the Vienna Convention. The depositary should not express a view regarding the impermissibility of a reservation but should be limited to transmitting the reservation to the parties to the treaty. For example, with regard to guideline 2.5.9(b), the withdrawal of a reservation with retroactive effects (particularly in the field of human rights treaties) could also entail effect under criminal law. The question arose, therefore, as to whether the withdrawal of a reservation of the kind referred to could be regarded as adding to the right of the withdrawing State. Also, in draft guideline 2.5.3 the words "internal law" as applied to international organizations should be replaced by the words "rules of international organizations". The title of guideline 2.5.4 could be redrafted to read "Competence to withdraw a reservation at the international level" in order to reflect more precisely the substance of that provision. Or with regard to draft guideline 2.5.10, the wording "achieves a more complete application of the provisions of the treaty" appeared to be redundant in view also of guideline 2.5.11 which elaborated on the effect of partial withdrawal. It was also suggested that the Guide to Practice should include a draft guideline to the effect that non-contracting States could not formulate objections to a reservation made by a contracting State.

176. As to the "reservation dialogue" which would be dealt with in future reports and awaited with great interest, its modality should not be predetermined, as there were many ways in which States could explain their intentions with respect to a reservation or objection.

2. Definition of objections (draft guideline 2.6.1)

177. The view was expressed that the proposed definition did not take into account the differences between an objection and a reservation. The legal effects of an objection, according to this wording, were similar to those arising out of the acceptance of a reservation, i.e. the provision of the treaty to which the reservation was made did not apply. Even the alternative wording referring to the State's intention neglected the fact that an objection could not circumvent the legal effect of a reservation. The definition of objections should include both elements, the legal effects of an objection and the intention of the objecting State.

178. It was also stated that the proposed definition did not take into account the fact that the formulation of the objection was not necessarily intended solely to prevent the application of the provision of the treaty to which the reservation related between the author of the reservation and the State or organization which had formulated the objection or to prevent the treaty from entering into force on the relations between them. The State or organization might also object to a reservation on the grounds that it was impermissible because it was prohibited by the treaty or was incompatible with the object and purpose thereof, as provided in article 19 (a) and (c) of the Vienna Convention on the Law of Treaties.

179. The view was expressed that the Commission should not attempt to codify a definition of objections to reservations since articles 20, paragraphs 4 (b) and 5, and 21 of the Vienna Convention were sufficient in that regard, but it should pursue its examination of State practice.

180. It was stated that practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions. Such practice should be taken into consideration. Adoption of the definition as proposed by the Special Rapporteur would deny States their current flexibility in objecting to reservations.

181. Some doubt was expressed as to whether the proposed definition fully encompassed all the intentions with which States formulated objections: it focused too much on the contractual aspect of objections while neglecting the policy aspect. Reactions to reservations to the growing number of normative treaties often focused primarily on the proper interpretation of a given provision rather than on the specific inter se application of the provision concerned between the reserving and the objecting State. Objections that related to the qualitative and substantive aspects of the reservation should not be excluded from the Guide to Practice.

182. Some delegations found the proposed definition acceptable because it was based on the Vienna Conventions and was broad enough to cover a miscellany of intentions on the part of States or international organizations.

183. The view was also expressed that the second version of draft guideline 2.6.1 contained in footnote 221 of the Commission's report was preferable because it was neutral with regard to the permissibility of objections to reservations. A State which made an impermissible reservation could not be deemed to be a party to the treaty.

184. It was stated that the proposed definition provided an appropriate description of an objection, while the revised version might eliminate the possibility of not applying all the articles of a treaty between the parties, which was permitted by article 21, paragraph 3, of the Vienna Convention. That approach would make it possible to determine whether a State intended not to apply the part of the treaty to which the reservation related, whether it intended to block the application of the entire treaty in relation to the reserving State or whether it was making a comment that had no legal effect with regard to the reservation. It was important to avoid making a judgement based on the mere presence of the term "objection" in the statement. It was useful for States with common interests to share information or reservations made by other States.

185. It was suggested that a broader definition than one based strictly on the Vienna Convention would be more realistic. There was agreement that the legal effect of objections was determined by the intention of the objecting State, which should therefore thoroughly consider how best to formulate the objection. Intention was thus a crucial element of objection. Also, according to another view, a reference to the effects that the objection produced was another important element.

186. The definition of objections should not include all types of unilateral responses to treaties but only those made in order to prevent the reservation from producing some or all of its effects. It was pointed out that an objection was a reaction to a reservation intended to make the effects of the reservation inoperative. The reaction of a party seeking to modify the content of a reservation could not be classified as an objection. As set out in the Vienna Convention, the objection should either make the provisions to which it referred inapplicable or prevent the entry into force of the treaty between the parties involved. On the other hand, it was pointed out that a narrow definition of objections to reservations had several advantages and left more room for the "reservations dialogue", namely the discussions between the author of a reservation and its partners intended to encourage the former to withdraw the reservation. In any event, States themselves should clarify the issue by using the word "objections" if that was their unilateral response to a reservation, since that was the term used in the Vienna Conventions.

187. It was also suggested that the definition of objections to reservations, if there was any need for one, should include all the negative reactions to reservations, either with regard to the content or the fact that they were late. The effects of objections should remain as defined in the Vienna Convention on the Law of Treaties.

188. Some delegations pointed out that their practice of objecting to reservations considered incompatible with the object and purpose of a treaty (especially a human rights treaty) was based on the fact that incompatible reservations were ipso facto invalid and therefore impermissible. Such objections while not strictly necessary (because the reservations in question had no legal effect) had the advantage of spelling out the views of other parties to the treaty, to the effect that the reservation must be considered null and void. However, it did not necessarily follow that the State that had made an impermissible reservation would not be on a treaty relation with those who had objected to that reservation. The proposed definition of objections excluded those directed at invalid reservations and then disregarded an important part of existing State practice and the practice of the European Court of Human Rights. On the other hand, there was no need to assess all possible effects of

objections in detail in order to produce a valid definition of what should constitute an objection. The question of purported effects could be dealt with separately. Thus, the proposed definition in paragraph 313 could be acceptable provided that it included situations in which an objecting State pointed out that a given reservation was null and void.

189. Some other delegations were of the view that State practice demonstrated that objections raised in the context of human rights instruments did not simply address the issue of the incompatibility of a given reservation but also determined the legal consequences of an invalid reservation. In many instances, objecting States had applied the severability principle to unacceptable reservations by considering the treaty operative for the reserving State without the benefit of the reservations.

190. The view was also expressed that the definition of objection should state clearly that objections to reservations could only produce the legal effects defined in the Vienna Convention directly or indirectly. Objecting States could either claim that the reservation was inadmissible by invoking article 19 of the Vienna Convention or they should deem a reservation admissible but formulate an objection on other grounds. In such a case, the whole treaty or the provisions to which the reservation related would not apply in the relations between the reserving and the objecting States. In the case of an objection based on the claim of the inadmissibility of the reservation, a dispute might arise between the reserving and the objecting States. The parties should endeavour to resolve the dispute. But if the dispute was not settled, any objections to reservations should be governed by the provisions of the Vienna Convention. An objecting State's unilateral claim that the whole treaty should enter into force in its relations with the reserving State, based on the opinion that the reservation was inadmissible, would have no legal effect and would not be accepted in practice.

191. It was also proposed that the definition of objection should make clear that an objection formulated by a State or international organization would not affect relations between the reserving party and other contracting parties; such objection could prevent (totally or partially) a reservation from having effect only in relations between the reserving and the objecting States.

192. It was also stated that an objection with super maximum effect destroyed a basic element of the State's consent in acceding to treaties, for the sake of the treaty's integrity.

3. Extension of the scope of a reservation

193. Some delegations thought that there was a fundamental difference between the late formulation of a reservation and the interpretation of an existing one in order to extend its range of application. An equal treatment of the two could jeopardize international legal certainty. Therefore, the Commission should restrict the legal ability of States to extend the scope of a reservation.

194. Some other delegations expressed concern at the potential problems inherent in enlarging the scope of a reservation at a later date; such enlargement should be viewed as a late formulation of a reservation and should be treated as such.

195. According to several delegations, the rules of the enlargement of a reservation could be brought into line with those applicable to late formulation which had been adopted by the Commission in 2001. In the event of a State or international

organization displaying bad faith, the opposition of a single State would prevent enlargement of the reservation. This would not encourage such enlargements. However, the view was expressed that such guidelines would be inconsistent with the object and purpose as well as the timing requirements of the Vienna Conventions because reservations were and should remain an exception to a treaty. They could thus undermine the stability of treaty obligations.

196. Enlargement of the scope of reservations did not necessarily constitute an abuse of rights and attempts to enlarge the scope of a reservation existed in treaty practice. It was less a case of abuse of rights than of a desire to take into consideration technical constraints or specific aspects of internal law. The possibility of enlarging the scope of a reservation would therefore be subject to very strict conditions, namely the rules applicable to late formulation of a reservation. The relevant guideline should also contain a definition of enlargement and specify the effects of any objection made to it.

197. Thus, it was pointed out that there were situations in which a State or international organization felt compelled to reformulate a previous reservation (for example because amendments to its constitution were incompatible with a provision of a convention to which it was a party); otherwise it might be forced to withdraw from the treaty. If States could modify a treaty by mutual agreement, it followed that they could also agree to the formulation of enlarged reservations. This enlargement was not conceivable in the case of interpretative declarations, which could be formulated, modified or withdrawn at any time.

4. Communication of grounds for objections

198. Some delegations supported the prompt circulation of the reasoning for objecting to reservations as a means to induce the reserving party to reconsider its position and possibly withdraw the reservation.

199. The view was expressed that the very cases in which it was of paramount importance to specify the grounds for an objection were those where, in the opinion of the objecting State, the reservation to which the objection was being entered was impermissible. Objections should be specific and transparent and objecting States should be encouraged to indicate not only their reasons but also the desired effect of their objections on the text of the objections themselves. According to another view, States should be encouraged to state the grounds for their objections, especially in the case of reservations subordinating the application of provisions of a multilateral treaty to domestic law, in the hope that other States would formulate similar objections which might encourage the reserving State to withdraw its reservation. Communicating the grounds for objections, although the practical effect of such a rule was doubtful, would help the reserving State to better understand the wishes of the objecting State. Recent practice showed that States were more willing than ever to indicate the legal reasoning for considering a reservation unacceptable and the legal effects of such a determination. It was also pointed out that the grounds for the objection should be stated clearly but should not be subject to evaluation by the State formulating the reservation, in order to avoid awkward discussions of the quality of the arguments on which the objection was based.

200. Alternatively, the view was expressed that the reserving State would have an opportunity to evaluate the validity of the objection, review its reservations and, if necessary, formulate an appropriate justification and response to the objecting State

or withdraw or modify the reservation. Several delegations, however, felt that this was a policy issue rather than a legal question. While it would be useful for the grounds for objections to reservations to be stated clearly in order to avoid misinterpretation and to allow the reserving State to review the issue in question, they saw no need to make such a practice obligatory. There was no legal obligation to state clearly the grounds for objections to reservations. It was of course desirable to do so, but State practice was not very consistent in that regard. Justifying the objection could have an informative or educational value; moreover, the indication of what was not acceptable to the objecting State could amount to relevant State practice, should questions concerning the development of customary law arise.

F. Shared natural resources

201. Delegations expressed support for the approach taken by the Special Rapporteur in studying the technical and legal aspects of the topic prior to making a decision on the scope of the endeavour. In that connection, it was said that an in-depth analysis of State practice and existing international agreements was indispensable to the study.

202. It was also noted that legal norms were but one element among a series of factors to be considered in such a complex topic and that it was essential that the legal norms developed by the Commission could be readily understood and implemented by technical experts and managers.

203. The point was also made that the technical needs of developing countries should be taken into account so as to enhance their capacity to participate effectively in the work on the topic.

204. Some delegations voiced their support for beginning the Commission's work on the topic with the issue of confined transboundary groundwaters; the oil and gas aspects would be considered at a later date. Furthermore, it was stated that other resources, such as minerals and migratory birds, should definitely be excluded from the endeavour. The view was also expressed that the Commission should limit its work to the subject of groundwaters.

205. As regards the title of the topic, it was suggested that the word "shared" should be more clearly defined. The view was expressed that "transboundary natural resources" would be preferable as a new title, since it would refer to resources extending across territories under the jurisdiction of more than one State and therefore require the formulation of international principles and norms. The term "shared" was not sufficiently specific since a resource that was not transboundary could nevertheless be shared, in which case the State in which it was located was responsible for regulating it. Delegations emphasized that any intimation that the term "shared resources" referred to a shared heritage of mankind or to notions of shared ownership would be misleading.

206. Some delegations agreed with the view of the Special Rapporteur that groundwaters have a bearing on international peace and security, human health and the protection of the environment; accordingly, their effective and sustainable management was essential for poverty eradication and ecosystem protection. Thus, the topic was ripe for codification. There was clearly a need for a legal framework to address the problems raised on the subject matter, especially through subregional

and regional cooperation. The point was made that the Commission should cover all aspects of groundwater management, but with particular attention to the use and pollution of confined groundwaters.

207. Caution was voiced concerning the drawing of close parallels with oil or gas since that would overlook the essential role of groundwaters for, inter alia, broader ecosystems, biodiversity and human health.

208. The point was made that the Commission should focus on "confined transboundary groundwaters" and that their vulnerability and renewability, as well as their significance for the freshwater supply, should be taken into account in the elaboration of a regime to govern them.

209. It was also pointed out that the norms to be developed by the Commission should be applicable to all transboundary groundwaters, irrespective of whether they were being exploited by one or more States.

210. Given the fact that the effects of human activities on groundwaters could in some cases be felt only after lengthy periods of time, the point was made that the study should have a practical approach by focusing on solving current issues or issues that might arise in the near future.

211. As regards the information requested by the Commission on the management of groundwaters, it was suggested that the Commission could draw upon the policy guidelines and decisions taken at different international conferences, such as those of the World Water Council. Reference was also made to the European Community Directive 2000/60/EC which constituted the framework of a comprehensive water management policy, and to several bilateral treaties and institutions. Furthermore, it was noted that in relation to national legislation, the applicable norms could take the form of federal and local regulations; therefore coordination and cooperation at those levels was essential. Some reference was also made to national laws and regulations on the topic of groundwaters.

212. It was stated that account should be taken of the relationship of the topic to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources and the notion of transboundary harm, as well as the codification efforts on the issue of water as a natural resource, which include the 1966 Helsinki Rules on the Uses of the Waters of International Rivers, the 1986 Seoul Rules on International Groundwaters and the Bellagio draft treaty on the use of transboundary groundwaters.

213. In the light of the fact that actions in one State had an impact on the use of groundwaters in other States, it was deemed necessary to consider the interests of all States and, to the extent possible, ensure their sovereignty over those resources.

214. It was suggested that the Special Rapporteur should proceed to elaborate general substantive rules on confined transboundary groundwaters, taking into account work accomplished at the regional level. In the formulation of the respective principles and cooperation regimes, it was felt that a dispute settlement mechanism should be included. However, according to another view, aspects such as dispute settlement could be postponed to a later stage. It was stated that instead of a detailed set of regulations, in the beginning the endeavour should seek to obtain agreement on the most important general principles, including that of *sic utere tuo ut*

alienum non laedas. As to the final form of the endeavour, some brief reference was made to a set of common principles which could be applied locally and globally.

215. Given the particular vulnerability of groundwaters, it was deemed that heightened standards of due diligence were required, as compared to the principles concerning surface water, including the obligation to protect them from pollution and to prevent significant harm. It was also stated that measures aimed at alleviating and preventing pollution problems should be limited to protecting ecosystems through sustainable water resource management and should focus on cooperation in the efficient use of water and in its protection and conservation for future generations.

216. The point was made that the national regulations for the protection of groundwater from pollution should be supplemented at the international level, particularly through existing treaty law, such as the Stockholm Convention on Persistent Organic Pollutants. Thus, it was suggested that the Commission should focus on the elimination of certain ultra-hazardous as well as hazardous substances and the development of programmes for widespread technical assistance for the protection and restoration of groundwaters.

217. Some doubts were expressed regarding the use of concepts referred to in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, such as "confined groundwaters" and "groundwaters unrelated to surface waters", since they did not enjoy undisputed recognition. Similar doubts were formulated in relation to using the principles contained in the aforementioned Convention since groundwaters were not amenable to generalization and there was a lack of State practice; in addition, the 1997 Convention had not achieved universality. On the other hand, it was also stated that the 1997 Convention could offer a minimal point of departure in the codification of confined transboundary groundwaters. The point was made that the term "confined transboundary groundwaters" needed to be clarified precisely, with the assistance of experts, and that the differences with surface waters also had to be pointed out.

G. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

1. General comments

218. Delegations expressed support for the inclusion of the topic in the Commission's current programme of work and the direction taken by the Commission on it. In addition to addressing topics entailing codification and progressive development, support was expressed for the Commission to take up other more restricted projects, such as the preparation of authoritative opinions or learned studies, provided that they addressed issues that were problematic or needed clarification. The topic on fragmentation, which was connected with the law of treaties and with the overall coherence of the international legal system, was considered a good example in that regard.

219. On the other hand, the Commission was urged to proceed with caution. It was noted that if it had to create mechanisms for coordination and harmonization, it would be departing from its role in the progressive development of international law

and its codification, and if it limited itself to a descriptive analysis, the exercise would be purely academic and extraneous to its mission.

220. The change in orientation of the topic as evidenced by the change in its title was welcomed and the need to study both the positive and negative aspects of fragmentation of international law was emphasized. It was observed that, despite the problems and conflicts which might arise as a result of fragmentation, it had positive aspects particularly in such fields as human rights law and international environmental law. Moreover, it was noted that fragmentation was a natural consequence of the expansion of international law and a sign of its vitality. It was also an indication of the growing willingness of States to subject their activities to explicit rules of international law, thus contributing to stability and predictability in international relations as well as the enforcement of the rule of law in international relations. It was also stressed that it was precisely because of current developments in global relations, and not in spite of them, that the continuous strengthening of international law was indispensable.

221. Concerning the negative aspects, the view was expressed that fragmentation, leading to overlapping jurisdiction and forum shopping, could have possible ramifications on fairness and impartiality in the dispensation of justice. Since the international system lacked a hierarchical court structure similar to that obtaining in domestic court systems, fragmentation could result in conflicting jurisprudence. It was also noted that if conflicting rules applied to the same set of facts, stability and predictability in international relations might be jeopardized.

222. The point was also made that in the context of reservations to treaties, enlargement of the scope of reservations could lead to problems of fragmentation, especially in the case of treaties with many States parties.

2. Distinction between institutional and substantive perspectives of fragmentation

223. Delegations expressed support for the distinction that ought to be made between the institutional and substantive perspectives of fragmentation and they welcomed the Commission's focus on the latter. Several delegations also rendered support to the suggested approach that the Commission should not deal with institutional proliferation or act as referee or mediator in relationships between different judicial institutions, or at least not at the current stage of its work. Confidence was expressed that such institutions would seize the opportunity to promote the effectiveness of international law by taking into account each other's jurisprudence and enhancing their cooperation.

224. Some delegations nevertheless noted that the Commission's work on substantive aspects could be indirectly useful in relation to institutional aspects, including heightening awareness among judicial institutions of the jurisprudence of each other and facilitating communication among them.

225. The point was also made that the consideration of institutional aspects was probably inevitable in view of the envisaged study concerning "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules".

226. In addition to the examples concerning the different patterns of conflict relevant to substantive aspects of fragmentation mentioned in paragraph 419 of the Commission's report, a reference was made to the *Loizidou* case.[9]

3. Work plan and methodology

227. Several delegations endorsed the work plan on the topic and related studies for the remaining part of the quinquennium (2004-2006) as proposed by the Study Group of the Commission and looked forward to receiving a substantive report in 2004. On the other hand, doubt was expressed as to whether the schedule of work was realistic. In view of the sensitive nature of the issues raised, it was observed that it would be difficult to make a satisfactory analysis of the five studies to be covered by the topic and to formulate guidelines on their various aspects within the allotted time.

228. Support was expressed for the exploratory methodology of not deciding in advance on the form the work would take. Delegations also expressed support for the possible adoption of guidelines. On the other hand, the point was made that the topic on fragmentation was overly broad and theoretical. Although the studies would be of interest, the topic was not suitable for the development of draft articles and the Commission should not attempt to produce guidelines.

229. While acknowledging the possibility of developing guidelines, the Commission was cautioned against drawing general principles from a limited number of specific instances in which fragmentation might have arisen and which might have been only relevant in a specific setting. It was suggested that the Commission might have to decide, at a later stage, whether to narrow the scope of application of the guidelines to be proposed or whether to embark upon a thorough study of each aspect of possible conflict that would arise. Taking into account considerations of time, the former approach was viewed as more realistic and it was suggested that a savings clause could then provide that the guidelines were applicable without prejudice to the future development of the law and agreements reached by States on any given subject.

230. In order to avoid an overly theoretical approach and to promote a useful exchange of views, a suggestion was made that questionnaires on issues requiring comment in relation to the five studies should be sent out to States and international organizations.

4. Comments on the various studies to be undertaken

231. Support was expressed for the five studies identified by the Commission. Their subject matter was considered to be of theoretical and practical significance and particular preference was expressed for the study of the rules and mechanisms dealing with conflict, for which the 1969 Vienna Convention on the Law of Treaties provided an appropriate framework.

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[9] *Loizidou v. Turkey (Preliminary Objections)*, 23 March 1995, *E.C.H.R., Series A*, No. 310 (1995).

(a) Function and scope of the *lex specialis* rule and the question of "self-contained regimes"

232. Several delegations welcomed the focus on and work undertaken in this study, noting that the *lex specialis* rule did not find adequate reflection in the 1969 Vienna Convention on the Law of Treaties. The view was expressed that the study should aim at clarifying the inherent lack of coherence and certainty in international law.

233. Support was expressed for the introductory work in the study concerning the distinction among the three types of normative conflict, namely conflict between different understandings or interpretations of general law; conflict arising between general law and a special law claiming to exist as an exception to it; and conflict between specialized fields of the law.

234. Also considered relevant by some delegations for the consideration of the Commission's Study Group in the context of the study were issues governed by regional norms, particularly in the context of the work of the regional arrangements or agencies under Chapter VIII of the Charter of the United Nations vis-à-vis the collective security system under the Charter as well as the functioning of regional mechanisms for the peaceful settlement of disputes and preventive diplomacy.

235. The point was made that there were only a small number of examples where the general law and the legal framework of the self-contained regime interacted and occasionally complemented each other. The general law was applicable when the dispute settlement mechanism embedded within the self-contained regime appeared not to function as well as where guidelines within a self-contained regime were drawn from the general law. Thus, when addressing fragmentation in the context of the study the more practical approach would be not to dwell excessively on the issue of the "self-contained regime" per se but to pay more attention to the issue of *lex specialis* and general law.

(b) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties)

236. It was observed that the Romanian branch of the International Law Association was undertaking research on the State practice on this study and intended to organize a seminar in Bucharest on the problems raised by the fragmentation of international law, which would help publicize the Commission's work among the legal experts of south-eastern Europe.

(c) Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, as conflict rules

237. It was observed that there was much scope for productive work concerning this study. The concept of peremptory norms of international law (*jus cogens*) from which States could not derogate by agreement, as distinct from rules which the parties might freely regulate by such agreement (*jus dispositivum*), as incorporated in the 1969 Vienna Convention on the Law of Treaties, needed the authoritative elaboration necessary to ensure objectivity, transparency and predictability. In that connection, attention was again drawn to previous outlines prepared in the Commission on the subject, which contained relevant material.

H. Other decisions and conclusions of the Commission

238. Several delegations noted that the completion in 2001 of the work on State responsibility, which was one of the last items from the 1949 long-term programme of work and one of the major codification projects pending in the area of general international law, seemed to have left on the Commission's agenda a void that was hard to fill. They hoped that future topics would not be dealt with within a similar time frame and that Commission would move in the direction of more flexible action and more multifaceted topics. In addition, they noted a certain tendency to maintain on the agenda all topics that had ever been included, regardless of the progress made in their development, codification or even clarification.

239. With regard to the long-term programme of work, several delegations said that the issue of protecting vulnerable populations in situations of internal conflict or victims of other man-made or natural disasters responded to a real need in the area of international cooperation and should be the subject of legal regulation. Those delegations stated that they had supported the initiative of the International Committee of the Red Cross to identify the existing legal and soft law instruments specific to disaster response situations in the context of the International Disaster Response Law project. The Commission was well placed to go further, focusing on situations that were not covered or were inadequately covered by existing conventions. In that regard, it should work in close consultation with the International Committee of the Red Cross and other relevant actors. There was no point in restating existing law in areas where legal rules were clear and sufficient. Accordingly, the theme of collective security would be best discussed in the Special Committee on the Charter; otherwise the result might be politicization of the Commission, which was a body of legal experts and as such lacked the political authority to elaborate genuine compromises. Those delegations also saw no practical usefulness in the study on "the principle of *aut dedere aut judicare*".

240. The same delegations also stated that, together with the topics entailing serious codification, they would welcome other more restricted projects, such as the preparation of authoritative opinions or learned studies, provided that they addressed issues that were problematic or in need of clarification; a good example was the topic of fragmentation of international law, which was connected with treaty law and with the overall coherence of the international legal system. They endorsed the work plan proposed by the Commission and were looking forward to receiving a substantive report on the topic in 2004. In their view the time appeared ripe for the Commission to introduce certain changes in its agenda, which might ultimately affect its modalities of work, including the length of its meetings.

241. With regard to the relevance of the work of the Commission, several delegations said it depended not only on the choice of the topics on its agenda but also on the dialogue with Governments. Although in most cases the comments of Governments contributed to the deliberations of the Commission and were reflected in the choices made by the Special Rapporteurs and the Commission, that was not always the case. The other side of the coin was the quality and focus of the debate on the Commission's report in the Sixth Committee. The proposal by the Governments of Austria and Sweden concerning the scheduling and duration of the debate and the timing of the publication of the report was feasible. The traditional formal debate, with long oral statements in the form of a succession of monologues, was hardly conducive to a meaningful exchange of views; the holding of direct and

informal consultations, as proposed by those two Governments, would in no way preclude serious, in-depth study and comments on the Commission's work. In that context, the in-depth comments should be circulated in written form and the oral statements should be short and focused. Those delegations stressed the important role of the ILC in the international law-making process, as well as its contribution to the strengthening of the international legal order. Unless changes were made in the way the Commission operated, the result might be stagnation and marginalization.

242. Some delegations also urged the ILC to incorporate more substantive information in chapters II and III of its report. Chapter III should be a central part of the report, since it identified the issues on which the Commission requested the views of States.

243. As regards the documentation of the Commission, some delegations supported the Commission's view on this issue and were opposed to limiting in advance and *in abstracto* the length of reports of Special Rapporteurs and of the Commission itself.

244. A view was expressed that the Commission should give no less weight to the views of Governments expressed in the Sixth Committee than to the written replies of Governments since small States were limited in their ability to produce documents on a wide variety of topics.

245. Support was also expressed for the view of the Chairman of the Commission with regard to the importance of the role of the Codification Division in the work of the Commission and for the point that this importance rested not only on the high quality of the members of the Division, their hard work and commitment to the Commission, but also on the fact that the members of the Division were involved in dealing with the content and substance of work as well as with the procedural and technical aspects of servicing and that this provided a continuous and useful interaction and feedback between the Commission and its secretariat. They agreed that the fact that the Codification Division served also as the secretariat of the Sixth Committee provided an invaluable and irreplaceable link between the two bodies. The Codification Division was thus in a position to be a source of information and unique expertise mutually beneficial for both bodies. This was a quality of servicing that must be preserved.